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“Gate of the Sun”: Applying Human Rights Law in the Occupied Palestinian Territories in Light of Non-Violent Resistance and Normalization

By Keren Greenblatt*

This paper is dedicated to the people of Palestine and the non-violent movement to fight the occupation, in the hope of a better future.

I. INTRODUCTION

¶1 On January 11th 2013, approximately twenty tents and several service structures were erected by Palestinian activists in an area in East Jerusalem, known as “E-1” or A-Tur.¹ Later, several other tents and structures were added, and close to two hundred activists were residing in the area.² On the same day, the Israeli Supreme Court issued a temporary injunction to prevent the eviction and destruction of tents that were built on the land of A-Tur unless there was an urgent security necessity. The petitioners argued before the court that the site was a tourist venture for the teaching of the Bedouin heritage. The respondents argued that this was a defiant action meant to create provocation, disturbances to public order, and riots.³ The activists released the following statement to the public:

¶2 We, the sons and daughters of Palestine from all throughout the land, announce the establishment of Bab Alshams Village (Gate of the Sun). We the people, without permits from the occupation, without permission from anyone, sit here today because this is our land and it is our right to inhabit it . . . Bab Alshams is the gate to our freedom and steadfastness. Bab Alshams is our gate to Jerusalem. Bab Alshams is the gate to our return . . . This action . . . is a form of popular resistance. In the coming days we will hold various discussion groups, educational and artistic presentations, as well as film screenings on the lands of this village.⁴

¶3 The next day, the area was declared a closed military zone, and later, Israeli security forces evicted activists from the tent village. Israeli forces submitted a statement to the court declaring that this action fell within the urgent security necessity exception to the injunction. More activists attempted to join the village and refused to comply with the

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¹ HCJ 248/13 Ghanam v. Secondary Committee for the Monitoring of Construction [2013], Nevo Legal Database (by subscription) (Isr.) [hereinafter *Abu Ghanam*].

² *Id.*

³ *Id.*

⁴ *About Bab Alsham*, FACEBOOK, <http://www.facebook.com/Babalshams2013/info>.

security force's instructions to leave the area. Subsequently, rioting developed and around twenty activists were arrested.⁵ The court is still waiting to hold a hearing on the property claims over this stretch of land, and the Palestinians' right to establish a village on it. Meanwhile, activists continue to put up new tents each time the military forces confiscate them.⁶

¶4 Bab Alshams is one of the most recent examples of the intensifying non-violent Palestinian resistance movement. Some other examples are the weekly marches against the security barrier (hereinafter "the Wall") that take place in villages where the barrier cuts people from their lands and prevents them from reaching school and work,⁷ the proliferation of Palestinian films and art against the occupation,⁸ and the mostly successful struggle toward statehood in the international arena.⁹ It is the premise of this paper that these phenomena require a new inquiry into the balance between the law of belligerent occupation within the framework of the international humanitarian law (hereinafter "IHL") and international human rights law.

¶5 In this paper I argue that the prolonged duration of the Israeli occupation of the Palestinian territories (hereinafter "OPT"), combined with the intensifying non-violent resistance, justifies a stronger human rights law approach, rather than an IHL approach, in the administration of the Palestinian population and lands.

¶6 International humanitarian law and human rights law are complementary systems, both of which aim to protect the lives, dignity, and health of human beings. Humanitarian law is designed to apply in times of emergency (particularly in times of armed conflict). Human rights law always applies.¹⁰ For this reason, there are certain human rights from which governments are permitted to derogate during times of emergency, under a specific structure of conditions. However, none of the provisions of humanitarian law can be suspended in emergency, since it only applies in those times.¹¹ Humanitarian law focuses on military actions; human rights law focuses on the obligations of governments toward individuals in their jurisdictions. Further differences between these two systems will be explained throughout this paper, with particular emphasis on the concrete implications of shifting from a humanitarian law paradigm to a human rights paradigm with regard to the situation in Palestine.

¶7 There are many implications to the theoretical implementation of such a paradigm shift. These may include the de-legitimization of the Israeli government's use of security as justification for human rights violations, further protection of Palestinian property (including lands and homes), the cessation of settlement activity as a form of dispossession and discrimination, further protection of Palestinians' right to health, education, freedom of movement, among others, and perhaps a new approach to the

⁵ *Abu Ghanam*, *supra* note 1.

⁶ *Id.*

⁷ See generally *Background on Demonstrations in the Palestinian Territories*, B'TSELEM (Jan. 2, 2013), <http://www.btselem.org/hebrew/demonstrations> (documenting the many demonstrations Palestinians have undertaken at the Wall in the past four years).

⁸ E.g., *Five Broken Cameras*, *infra* note 117.

⁹ G.A. Res. 67/19, ¶ 8, U.N. Doc. A/RES/67/19 (Nov. 29, 2012).

¹⁰ *What is the Difference between Humanitarian Law and Human Rights Law?*, INT'L COMM. OF THE RED CROSS (Jan. 1, 2004), <http://www.icrc.org/eng/resources/documents/misc/5kzmuy.htm>.

¹¹ *Id.*

human right of self-determination, eventually leading to the end of the occupation altogether.

¶8 In the first section of this paper, I review the origins and fundamentals of the international law of belligerent occupation and its relation to international human rights law. In the second section, I provide a brief background of the Israeli occupation of the OPT, particularly of the West Bank. In the third section, I review the different approaches to what the applicable legal framework in this situation ought to be, including the Israeli and Palestinian approaches and those of the international community. In the fourth section, I discuss the different approaches and argue that, currently, the most persuasive applicable legal framework is a strong human rights law approach, with a few general norms borrowed from the law of armed conflict. In the final section, I analyze the case of Bab Alshams in light of this proposed approach and show how this approach would have produced radically different outcomes.

II. FROM CONQUEST TO TRUST

A. *The development of the law of belligerent occupation*

¶9 The law of belligerent occupation governs the relationship between an occupying power and the inhabitants of an occupied state. According to traditional sources, the law is applicable in situations of international armed conflict. It is important to review the evolution of the law of occupation as a basis for later understanding the Israeli conduct in the OPT.

¶10 The first authority to codify norms addressing occupation was the Lieber Code,¹² commissioned by President Lincoln during the Civil War. This code clearly prioritized military needs over humanitarian considerations.¹³ The first *international* attempt to codify the law of occupation was the Brussels Declaration of 1874,¹⁴ which offered a definition of occupation that survived into the later, better-known projects: the Hague Conventions and Regulations of 1907.¹⁵ The definition of occupation in the Brussels Declaration was “a territory actually placed under the authority of a hostile army bounded by the territories around which it could establish and exercise authority.”¹⁶ The Hague Conventions provided a detailed enumeration of customary international humanitarian law,¹⁷ and they have reached the level of customary law themselves.¹⁸ Article 42 of the

¹² *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3* (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

¹³ Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 561 (2005).

¹⁴ *The Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, [hereinafter Brussels Declaration] reprinted in Schindler & Toman, supra note 12, at 26-34.*

¹⁵ Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 (1911), T.S. No. 539 [hereinafter *Hague Regulations*].

¹⁶ Brussels Declaration, *supra* note 14, art. 1.

¹⁷ Customary international law is the set of norms that are a general practice that is also accepted as binding law, and that exist regardless of whether they are codified in a treaty or other written form. For further reading, see Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., ONLINE EDITION ¶¶ 7-9 (2009), <http://www.mpepil.com>.

Hague Regulations repeated almost precisely the Brussels definition of occupation.¹⁹ These instruments provided for the protection of civilians living under occupation, who are entitled at all times to respect for their persons, honor, family rights, religious conviction and customs, and should also enjoy protection of their private property.²⁰ Collective punishment is forbidden,²¹ and several other rights and duties are prescribed. The notion of actual authority or control by the occupying military over the occupied population was expressed by the obligation to restore and ensure public order and safety while respecting, unless absolutely prevented, the laws of the occupied territory.²² This obligation has been interpreted by occupying powers and the international community as the ability to issue and enforce directives to the inhabitants of the territory.²³

¶11 In 1949, the Fourth Geneva Convention²⁴ codified these rules once again, with several additional norms learnt from World War II.²⁵ Common Article 2 expanded the scope of the laws of occupation to include situations of conflict that lack an official declaration of war and armed resistance by the occupied population.²⁶ The substantive provisions of the Convention further advanced the protections of the individual rights of the occupied population.

¶12 Article 75 of the Geneva Convention's Additional Protocol I provided a minimum standard of fundamental rights to be enjoyed by "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol."²⁷

¶13 Because these norms have developed in the nineteenth and early twentieth centuries, and within the context of the law of armed conflict, there is no doubt that significant elements of this legal framework are anachronistic and require continuous revisiting as the nature of armed conflicts around the world changes.

¶14 Today, the widely accepted²⁸ definition of the phenomenon of occupation is the following:

The exceptional exercise of public power by one state in a foreign territory and over its inhabitants . . . the effective control of a power (be it one or more states or an international organization, such as the United Nations)

¹⁸ *Judgment of the Nuremberg International Military Tribunal (30 Sept. 1946)*, 22 Trial of the Major War Criminals Before the Int'l Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946 411, 497 (1948).

¹⁹ Hague Regulations, *supra* note 15, art. 42.

²⁰ *Id.* art. 46.

²¹ *Id.* art. 50.

²² *Id.* art. 43.

²³ Edmund H. Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L. J. 2, 393-395 (1945).

²⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

²⁵ INT'L COMM. OF THE RED CROSS [hereinafter *ICRC*], THE LAW OF ARMED CONFLICT: BELLIGERENT OCCUPATION (2002), http://www.icrc.org/eng/assets/files/other/law9_final.pdf.

²⁶ Fourth Geneva Convention, *supra* note 24, art. 2.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3.

²⁸ Ben-Naftali et al., *supra* note 13, at 560.

over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.²⁹

¶15 This definition, though not accepted by Israel, proves useful as it includes the many different existing kinds of occupations³⁰ and allows for a substantive analysis of the conduct of the occupying powers, without having to struggle with how each situation, unique as it is, *qualifies* as an occupation. Nevertheless, this paper will examine the different approaches to the question of the Israeli occupation of the Palestinian territories, including the convoluted position that Israel has taken, which in some ways rejects the notion of the existence of an occupation.³¹

¶16 The contemporary, inclusive definition revolves around the most fundamental pillar of the law of occupation: occupation *does not accord the occupant title* to the territory. In other words, it temporarily severs the link between sovereignty and effective control.³² The *temporal* element of occupation, although not explicitly included in this definition, is clearly understood from the constitutive texts of the law of occupation,³³ its historical development, and the notion of the inalienability of sovereignty.³⁴ In accordance with the temporal element, the occupant serves as a trustee of the sovereign for the duration of the occupation, in a manner that protects civil life.³⁵ Although not codified in an international instrument, this contemporary definition more closely corresponds with current interpretations of situations of occupation and the legal framework applicable to them.³⁶ Accordingly, it also serves recent developments in the theory of the law of occupation, which infuse international human rights law into the application of the law of armed conflict in different ways. These developments will be discussed in section I(b).

¶17 Some of the fundamental purposes of the law of occupation include: 1) ensuring that civilians under the control of an occupying power are treated humanely; 2) harmonizing these humanitarian interests with the military needs of the occupying power; 3) preventing the occupying power from imposing drastic and permanent changes in the occupied territory's political, economic, social and legal orders; and 4) facilitating the prospects for a future peace agreement, which will determine the permanent status of the territory.³⁷ As this body of law developed, along with a parallel general shift in international law from a sovereignty-focused system to an individual rights-focused system, the emphasis on the military needs of the occupying power has gradually diminished.³⁸ In the background of the changes put into the Geneva Convention, as

²⁹ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3 (2d. ed. 2012).

³⁰ Some list as many as seventeen kinds, without being exhaustive. See Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 51 (1990).

³¹ See *infra* section III(a).

³² Ben-Naftali et al., *supra* note 13, at 560.

³³ E.g., Hague Regulations, *supra* note 15, art. 43 (which provides for the obligation of the occupant to respect (not make any changes to) the laws in force in the occupied country).

³⁴ Ben-Naftali et al., *supra* note 13, at 560.

³⁵ *Id.*

³⁶ See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) [hereinafter *The Wall Advisory Opinion*]; Al-Skeini and Others v. The United Kingdom, App No. 55721/07, Eur. Ct. H.R. (2011); Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. (2005).

³⁷ Roberts, *supra* note 30, at 46.

³⁸ Ben-Naftali et al., *supra* note 13, at 561.

compared to the Hague Conventions, was the protection of the occupied civilians, rather than facilitation of the occupant's interests.³⁹ This, however, does not mean that there has been a total de-legitimization of military or security needs. It is instead a question of balance between those needs and the rights of the protected persons.

¶18 For obvious reasons, certain occupying powers such as Israel have a vested interest in taking a traditional and conservative approach to the applicable legal system to their occupation. The more progressive the approach, the more the weight of the balance shifts towards the protection of individuals. But it is not only a question of progressive versus traditional worldviews—it is also a matter of legitimacy, international relations, policy, and politics. The next section addresses the relationship between the law of armed conflict and human rights law in the arena of occupation, in order to lay the groundwork for the argument of why human rights law ought to prevail as the primary applicable legal regime for the OTP.

B. Strange bedfellows: the relationship between the laws of armed conflict and human rights

¶19 Recent developments in the theory, and perhaps the practice of the law of occupation, introduce international human rights law into the application of humanitarian law through several approaches. One approach views human rights law as the general legal background that protects individuals at all times, whereas IHL is applied in a situation of occupation as *lex specialis*.⁴⁰ According to this approach, human rights law will be called upon in cases of lacunae in the law of occupation, or for interpretational purposes.⁴¹ Another approach views human rights law as complementary to IHL in a more harmonious, coexistent manner.⁴² This approach suggests that there is no need to “choose” the *lex specialis* over human rights law, but rather to look for the consistent, harmonious application of the two systems.⁴³ The Human Rights Committee even suggested reversing the order and using humanitarian law to interpret human rights provisions.⁴⁴ In any case it is already well established that human rights obligations prevail in some form in circumstances of belligerent occupation.⁴⁵

¶20 One concern of applying human rights law to occupation is the underlying requirement of sovereignty for the application of human rights obligations. The extraterritorial applicability of human rights law remains a highly contentious debate.⁴⁶ Nevertheless, and perhaps surprisingly so, it seems that there is much less controversy when it comes to military occupation situations. Several international bodies, including

³⁹ BENVENISTI, *supra* note 29, at 100.

⁴⁰ Antonio Cassese, *Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, ¶ 143, U.N. Doc. S/2005/60 (Jan. 25, 2005).

⁴¹ Ben-Naftali et al., *supra* note 13, at 576.

⁴² See The Wall Advisory Opinion, *supra* note 36.

⁴³ *Id.*

⁴⁴ U.N. Hum. Rts. Comm., *General Comment No. 31*, ¶ 11, CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *UNHRC GC 31*].

⁴⁵ Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INTL. REV. RED CROSS 317 (2012).

⁴⁶ See, e.g., *Al-Skeini*, *supra* note 36.

the International Court of Justice (ICJ)⁴⁷ have confirmed the assertion that the Occupying Power must abide by human rights obligations as the administrator of the territory and its inhabitants.⁴⁸

¶21 Another question relevant to this complex relationship is whether most of the human rights obligations that states or tribunals would find applicable in a situation of occupation, considering that some obligations cannot be applied due to the constraints of the situation and stronger IHL norms, do not *already exist* under the rules of IHL. One answer to this question is simply “no.” Many of the rights enumerated in the ICESCR as well as some civil and political rights such as the freedom of assembly, for example, are not adequately covered by traditional IHL. Furthermore, applying human rights law adds more than additional rights and freedoms; in general, it adds a different approach to how a controlling power can derogate from those particular rights. This approach is much stricter on the government and its interests and needs, and it adds, in particular, the possibility of recourse from international human rights mechanisms,⁴⁹ at the very least in territories that are part of strong regional human rights justice systems such as the EU or the OAS.

¶22 These questions are not simply theoretical or academic in nature. In a series of cases brought before European tribunals, for example, the applicability of human rights instruments came into question in situations of armed conflict and different types of occupations. In a case brought before the U.K. courts concerning the killing of six Iraqi civilians by British soldiers, the U.K. government contended that there is a difference between being an occupying power for the purposes of the Hague Regulations and Geneva IV, and having effective control for the purposes of the European Convention on Human Rights.⁵⁰ The court rejected this contention and determined that the UK was obliged to apply the ECHR as an occupying power in Iraq.⁵¹

¶23 In the *Issa* case, where the court could not find as a matter of fact that the petitioners were under the effective control of the Turkish forces, the European Court still found as a matter of *principle* that *even in a situation that is something less than a full fledged occupation*, a state could be held accountable for violations of treaty obligations.⁵² This particular case shows that although the petitioners were not able to meet the required evidentiary standards, the court did not avoid the contentious issue, but rather made a strong statement with relative ease as to the clear applicability of human rights obligations in a situation of “effective control.”⁵³

¶24 The Human Rights Committee, in interpreting the International Covenant on Civil and Political Rights (ICCPR), also made the same contention—that the Parties to the Covenant are required by article 2(1) to ensure the Covenant rights to all persons within their territory, *and* to all persons subject to their jurisdiction. This means that a party must

⁴⁷ The Wall Advisory Opinion, *supra* note **Error! Bookmark not defined.****Error! Bookmark not defined.**, at ¶¶ 107-112; *Loizidou v. Turkey*, Preliminary Objections, 310 Eur. Ct. H.R. (ser. A) ¶¶ 62-64 (1995).

⁴⁸ Lubell, *supra* note 45, at 319.

⁴⁹ *Id.*

⁵⁰ *Al-Skeini and Others v. Secretary of State for Defence*, [2007] UKHL 26, ¶ 124 (Eng.).

⁵¹ *Id.* at ¶ 149.

⁵² *See generally, Issa*, *supra* note 36.

⁵³ *Id.* at ¶ 71.

ensure the rights in the Covenant to anyone within its power or *effective control*, even if not situated within the territory of that state.⁵⁴

¶25 Although there are different paths to reach the same conclusion, and although there is now a presumption of a general applicability of human rights law, there is still a need to understand the specific context of an occupation to determine *how much* and which parts of human rights law are applied.⁵⁵ In other words, what are the substantive human rights obligations that apply to a specific situation?

¶26 It is implausible to require occupying states to uphold all of the rights enumerated in those instruments the state is bound by. This is not even possible in a normal, peacetime, domestic situation. Any state is constantly faced with the task of balancing conflicting rights and freedoms in order to maintain public order. However, the literature suggests that those rights that are *de facto* under the control of an occupying power should be observed⁵⁶ equally to the rights of a citizen of that state.⁵⁷ One factor for the determination of the substantive rights to be upheld in a specific situation is whether the removed or occupied sovereign has some areas of authority that have remained under its control.⁵⁸ Such is the case with the Palestinian Authority as agreed in the Oslo Accords, and will be discussed in the following section.

¶27 The Gaza Strip is a separate yet fascinating case study for this issue, because although Israel had unilaterally pulled out all of its military forces from the area, and Hamas had gained effective administrative control over the population,⁵⁹ the Israel Defense Forces (hereinafter “IDF”) maintain control over the airspace, maritime, and land borders of the strip. In that context, Israel imposes blockades that in many cases prevent food and medical supplies from moving in and out of Gaza, as well as the movement of people from Gaza to the West Bank, thus seriously violating certain fundamental human rights.

¶28 Another factor concerns certain obligations imposed on the occupying power by IHL, such as the prohibition on introducing new penal legislation unless it is absolutely essential for the fulfillment of the occupant’s obligations under the Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power.⁶⁰ A functioning and up-to-date criminal law system is indispensable to the full realization of many of the rights in the main human rights instruments, such as the rights to life, security of person, effective remedy, and equal protection of the law,⁶¹ to name a few.⁶²

⁵⁴ UNHRC GC 31, *supra* note 44, at ¶ 10.

⁵⁵ Lubell, *supra* note **Error! Bookmark not defined.**, at 323.

⁵⁶ *Id.*

⁵⁷ This corresponds with the highly contentious notion that Israel is conducting an Apartheid regime by offering different treatment to the Palestinians under its control than to the Jewish population living in the OPT. See, e.g., *Apartheid Wall: Why the Term Apartheid Embodies Historic, Present and Future of Palestine & is a Necessary Tool for Organization and Mobilization*, PALESTINIAN GRASSROOTS ANTI-APARTHEID WALL CAMPAIGN, <http://www.stopthewall.org/downloads/pdf/4PageFactSheetOctober9.pdf>.

⁵⁸ The Wall Advisory Opinion, *supra* note 36, at ¶ 112.

⁵⁹ See *infra* section II.

⁶⁰ Fourth Geneva Convention, *supra* note 24, art. 64.

⁶¹ International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(3)(a), 6, 9, 26, 999 U.N.T.S. 175 [hereinafter *ICCPR*].

⁶² Lubell, *supra* note 45, at 326.

¶29 Arguably, IHL provides sufficient leeway for the protection of such rights through the “absolutely essential” exception carved out in article 64 of the Fourth Geneva Convention⁶³ or the duty to take all measures in the occupant’s power to ensure, as far as possible, public order and safety in the occupied territory as provided in the Hague Regulations.⁶⁴ However, the notions of “absolutely essential” and “as far as possible” allow the occupying power to do the minimum amount of development needed in the occupied criminal system, and at the same time avoid taking measures that might improve the effectiveness, efficiency and scope of the rule of law in the occupied territory. As explained, one of the occupant’s primary obligations is to leave the occupied legal system untouched, as it was at the moment of occupation. This provides the occupant with the ability to easily evade its responsibilities toward the wellbeing of the occupied population, relying on the occupant’s compliance with international law. For this reason, among others, scholars have begun questioning whether IHL is a sufficient and just legal framework, particularly in situations of prolonged occupation.⁶⁵

¶30 Despite the positive developments toward human rights protection, both contemporary IHL and human rights law rightfully acknowledge the security needs of the state as a legitimate interest. For example, the Geneva Convention addresses “the imperative necessities of security of the State”⁶⁶ and the ICCPR and ICESCR allow for certain rights to be derogated in a proclaimed state of emergency,⁶⁷ and restrictions on rights to be applied for the legitimate aim of protecting national security.⁶⁸

¶31 Nevertheless, human rights law offers a specific, structured methodology with which to scrutinize any violation or restriction that the occupant justifies with national security needs. Specifically, where restrictions on human rights take place, the state must meet tests of necessity, proportionality, and legitimate aims;⁶⁹ a prescription by law;⁷⁰ and non-discrimination.⁷¹

¶32 As will be discussed in section IV, this scrutiny is one of the compelling reasons for the more dominant application of human rights law in place of the more militarily inclined IHL. Furthermore, a prevalent notion in the interpretive literature is that the occupant cannot use its IHL obligations as justification for denying the applicability of human rights obligations.⁷² This seems to be a more progressive step in the interpretation of the relationship between IHL and human rights law in situations of occupation. Nevertheless, it has a strong basis in the human rights instruments themselves, and it does not follow from this assertion that the human rights obligations trump IHL in all circumstances. Instead, this argument focuses on negating the attempts to evade the *general* applicability of human rights law, despite the legitimacy of particular situations where the occupant could not meet its human rights obligations due to the

⁶³ Fourth Geneva Convention, *supra* note 24, art. 64.

⁶⁴ Hague Regulations, *supra* note 15, art. 43.

⁶⁵ See generally Roberts, *supra* note 30.

⁶⁶ Fourth Geneva Convention, *supra* note 24, art. 9.

⁶⁷ ICCPR, *supra* note 61, art. 4(1).

⁶⁸ *Id.* art. 12(3); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 8(1)(a), (c), 993 U.N.T.S. 3 [hereinafter *ICESCR*].

⁶⁹ UNHRC GC 31, *supra* note 44, at ¶ 6.

⁷⁰ ICCPR, *supra* note 61, art. 19(3).

⁷¹ *Id.* art. 4(26).

⁷² See Lubell, *supra* note 45, at 327

circumstances.⁷³ Accordingly, IHL provisions such as article 43 of the Hague Regulations must not be used to allow occupants to avoid accountability when they choose not to take action to ensure public order and safety⁷⁴ when needed.⁷⁵

¶33 The next level of this argument is the differentiation between the negative and positive aspects of human rights obligations. Negative obligations such as refraining from arbitrary killings, arrests, and detentions are applicable at all times. The positive obligations, such as providing or ensuring an effective law enforcement system, are dependent on the context of the conflict.⁷⁶ Subsequently, situations of prolonged occupation may require active intervention in order to prevent stagnation in the economic, social and legal arenas. Thus, the duration and level of normalization of the occupation are an imperative contextual factor to be considered.⁷⁷

¶34 In order to fully understand how these different approaches may affect the applicable legal frameworks to the OPT, the next section provides a brief overview of the historical and legal background which led to the unimaginably complex situation in the Israeli-Palestinian conflict.

III. THE ISRAELI-PALESTINIAN TALE

¶35 The basic, traditional legal framework to be applied in situations of occupation is humanitarian law, and recent developments have introduced human rights law into the equation, creating a complex and intertwined relationship between these two bodies of law. Israel contends that neither of these systems applies to the Palestinian territories. In fact, in some cases, Israeli officials have denied the actual existence of a situation of occupation.⁷⁸ Why is this? What is unique about the Israeli-Palestinian situation that makes the applicable legal framework so contentious? This section further details the historical and legal background that will provide a basis for the analysis of the legal framework that ought to be applied to the Palestinian territories, and explain the complexity of applying international law to this situation.⁷⁹

¶36 In June of 1967, during what is called “The Six Day War,” the IDF gained effective control over territories beyond the “Green Line,” which was a temporary border delineated by the 1949 armistice agreements between Israel and its neighboring countries.⁸⁰ The international community generally saw Israel’s actions in this war as a legitimate use of force in accordance with the self-defense doctrine, after its neighboring countries were moving troops, removing UN peacekeeping forces, and closing the Straits of Tiran to Israeli vessels,⁸¹ clearly preparing to attack Israel. The territories Israel gained

⁷³ As was argued by the U.K. in *Al-Skeini*, *supra* note 36.

⁷⁴ BENVENISTI, *supra* note 29, at 9-11.

⁷⁵ *Id.*

⁷⁶ Lubell, *supra* note 45, at 329.

⁷⁷ *Id.*

⁷⁸ JUSTICE EDMUND LEVY, REPORT ON THE LEGAL STATUS OF CONSTRUCTION IN JUDEA AND SAMARIA (2012), <http://www.pmo.gov.il/Documents/doch090712.pdf>.

⁷⁹ The historical narrative presented here is a humble attempt to present the facts as collected from a variety of sources. However, it is important to note that any such attempt cannot encompass all possible narratives of the history of the conflict, as narratives are a primary source of contention and the scope of this paper does not suffice to address this complex issue.

⁸⁰ BENVENISTI, *supra* note 29, at 203.

⁸¹ Stephan Schwebel, *What Weight to Conquest*, 64 AM. J. Int’l. L. 344, 346 (1970).

in six days were three times as large as its territory on the eve of the war, and included the Sinai Peninsula and the Gaza strip acquired from Egypt, the West Bank and East Jerusalem from Jordan, and the Golan Heights from Syria.⁸² The Sinai Peninsula was returned to Egypt as part of the 1979 Peace Agreement between Egypt and Israel.⁸³ The Golan Heights remain under Israeli control to this day; in 1981 Israel passed a law extending its law, jurisdiction, and administration to the Golan,⁸⁴ without ever expressly stating that it was annexing the area. Nevertheless, both Israeli and international public opinion understood this law to be an annexation.⁸⁵ In the early 1990s Prime Minister Rabin attempted to revive the possibility of returning it to Syria in case of a peace agreement, which clearly did not come into fruition.

¶37 The Gaza Strip remained under Israeli occupation until 2005, when Israel unilaterally evicted its entire military and civilian presence from the territory in what it called the “Disengagement Plan.” Following the disengagement, the Hamas party won the 2006 Palestinian elections in Gaza, and an internal conflict began between Hamas and Fatah, the political party controlling the Palestinian Authority. Hamas then violently eliminated Fatah elements from Gaza, and gained exclusive control over the Strip, thus creating two separate regions of the OPT. Despite Israel’s claim that the occupation of the Gaza Strip ended with the Disengagement, the IDF continues to control the airspace, as well as access to the strip through land and sea. Gaza is also dependent on Israel for the supply of fuel and electricity,⁸⁶ which Israel has not always steadily provided.⁸⁷

¶38 In 1967, only eight weeks after the end of the war, the Knesset adopted a law similar to the Golan Heights Law, extending its law, jurisdiction, and administration to East Jerusalem. Unlike the Golan, and despite harsh criticism by the international community, including the U.N. General Assembly, Security Council, and the ICJ,⁸⁸ East Jerusalem was officially annexed when the Knesset adopted in 1980 the Basic Law: Jerusalem, Capital of Israel.⁸⁹ Subsequent to the enactment of the 1967 law, Israel offered the Arab residents of East Jerusalem citizenship, but few accepted. Those who did not become citizens were given permanent resident status that included the right to vote for municipal elections and receive social security benefits.⁹⁰ The municipality of Jerusalem administers the infrastructure and school system of East Jerusalem (with alleged discrimination),⁹¹ and finally, Palestinians residing in East Jerusalem cannot vote in general elections.⁹²

¶39 One of the territories that Israel acquired in 1967 is referred to as the West Bank (of the Jordan River). The West Bank had been under Jordanian administration since

⁸² Benjamin Rubin, *Israel, Occupied Territories*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. ¶ 2 (2009), <http://www.mpepil.com>.

⁸³ *Id.* at ¶¶ 83-88.

⁸⁴ The Golan Heights Law, 5741-1981, 36 LSI 7 (1981-1982) (Isr.).

⁸⁵ Rubin, *supra* note 82, at ¶¶ 68-76.

⁸⁶ *Id.* at ¶¶ 64-67.

⁸⁷ *Ongoing Updates on the Situation in Gaza: Activity at the Crossings and Tunnels, Prices and Shortages*, GISHA (Nov. 21, 2012), <http://gisha.org/updates/1832>.

⁸⁸ BENVENISTI, *supra* note 29, at 204-206.

⁸⁹ Though Israel has no constitution, Basic Laws have the normative level of constitutional provisions.

⁹⁰ Rubin, *supra* note 82, at ¶¶ 9-13.

⁹¹ *E.g.*, Tali Nir, *Social Services in East Jerusalem Are Facing Collapse*, THE ASS’N FOR C.R. IN ISR. (Feb. 1, 2007), <http://www.acri.org.il/he/?p=1469>.

⁹² Rubin, *supra* note 82, at ¶ 10.

1948⁹³—the year that both Israel and Jordan declared independence from the British mandate in their respective territories. Jordan claimed that it annexed the West Bank in 1950, but this action was widely regarded in the international community, including the Arab League, as illegal and void.⁹⁴ Thus, when the IDF seized the West Bank, the territory lacked a *de jure* sovereign,⁹⁵ a fact that may have deep implications on any analysis of the applicable legal framework.

¶40

In September 1993, Yasser Arafat and then Israeli Prime Minister, Yitzhak Rabin, exchanged letters containing mutual recognition of the other's existence and right to live side by side in peaceful coexistence. Subsequently, Israel recognized the Palestinian Liberation Organization (hereinafter "PLO") as the representative of the Palestinian people, and Israel and the PLO signed a "Declaration of Principles on Interim Self-Government Arrangements," also known as the Oslo Accords.⁹⁶ The Accords recognized the Palestinian people's right to govern themselves in the West Bank and the Gaza Strip,⁹⁷ and, along with later Interim Agreements,⁹⁸ provided for a gradual transfer of administrative responsibilities from the IDF to a Palestinian Authority. The 1995 Interim Agreement divided the West Bank into three areas:

- **Area A** includes the major Palestinian cities, and, thus, the vast majority of the Palestinian population. These areas are under the full control of the Palestinian Authority, in both civil and security administration.⁹⁹
- **Area B** includes Palestinian rural communities surrounding the major cities and is under the civil administrative control of the Palestinian Authority and the security control of the IDF.¹⁰⁰
- **Area C** includes all Israeli settlements and surrounding lands, the major roads, military posts, agricultural areas, nature reserves, and the Judean desert. These territories remained under Israel's full civil and military control. They amount to sixty percent of the West Bank, and house a population of approximately 180,000 Palestinians and 325,000 Israeli settlers.¹⁰¹

⁹³ BENVENISTI, *supra* note 29, at 204.

⁹⁴ Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 289-290 (1968).

⁹⁵ BENVENISTI, *supra* note 29, at 206.

⁹⁶ *Id.* at 209-10.

⁹⁷ Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestine Liberation Organization, art. III, § 1, Sep. 13, 1993, <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Principles>.

⁹⁸ Agreement on Preparatory Transfer of Powers and Responsibilities, Isr.-Palestine Liberation Organization, art. II, § 1, Aug. 29, 1994, <http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Agreement%20on%20Preparatory%20Transfer%20of%20Powers%20and%20Re.aspx>; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine Liberation Organization, art. I, § 1, Sep. 28, 1995, <http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx> [hereinafter *Interim Agreement, 1995*].

⁹⁹ However, since the second Intifada in 2000, the IDF has carried out arrests in these areas at its discretion, which demonstrates Israel's effective control over Area A as well. *See* BENVENISTI, *supra* note 29, at 211.

¹⁰⁰ *See* NOGA KADMAN, ACTING THE LANDLORD: ISRAEL'S POLICY IN AREA C, THE WEST BANK 11 (2013), http://www.btselem.org/sites/default/files/201306_area_c_report_eng.pdf.

¹⁰¹ *See Id.* at 5, 11-13.

¶41 The Interim Agreement prohibited either party from taking any action that would change the status of these territories and Gaza “pending the outcome of the permanent status negotiations.”¹⁰² As is well known, Israel has since taken many actions that changed the status of these territories by expropriating lands, approving construction and expansion of settlements, and, of course, the construction of the security barrier, or the Wall.¹⁰³ Furthermore, following the assassination of Prime Minister Rabin and consequent developments in the hostilities and political situation on both sides, reality did not allow for a full realization of the process envisaged in the Oslo and Interim Agreements.¹⁰⁴ Accordingly, the parties have not been able to reach the anticipated permanent status agreement.

¶42 In 2001, the Israeli cabinet adopted the first of a series of decisions to approve the construction of a security fence.¹⁰⁵ The Fence is also known as the security barrier or the Wall.¹⁰⁶ The Fence has become a major focus of legal, diplomatic, and popular contention, particularly due to several sections that were constructed on Palestinian territories and have caused a variety of human rights violations. This project was a response to the wave of terrorism emanating from the West Bank in the 2000s and prevented the infiltration of terrorists into Israel.¹⁰⁷ However, there has been a wave of criticism even within the Israeli system on the ulterior motives of the Wall’s construction, namely, the expansion of settlement lands.¹⁰⁸ Since the very first stages of its construction, approximately two hundred cases¹⁰⁹ have been brought before Israeli courts demanding changes in the course of the Wall or in the policies regulating the passage of Palestinian civilians. Some of these cases were successful.¹¹⁰ The construction also brought about the ICJ’s infamous Advisory Opinion, discussed in detail below, in section III(b).

¶43 According to data collected from the Israeli Security Agency Publications, since 2003 there has been a consistent decrease in the number of Israeli fatalities and injuries from Palestinian terrorist and other attacks (excluding rockets and mortars from the Gaza

¹⁰² Interim Agreement, 1995, *supra* note 98, art. XXXI, § 7.

¹⁰³ See generally KADMAN, *supra* note 100, at 14.

¹⁰⁴ BENVENISTI, *supra* note 29, at 211.

¹⁰⁵ Isr. Ministry of Def., *Purpose*, ISRAEL’S SECURITY FENCE, <http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm>.

¹⁰⁶ Among other reasons, the plurality of titles is due to the different characteristics of the barrier in different areas. In open fields (most of the barrier’s area), it consists of an electronic fence, paved pathways, barbed wire fences, and trenches, with an average width of 60 meters. In other locations, mostly in densely populated areas, the barrier is a concrete wall, 6-8 meters high. See Hagit Ofra & Noa Galili, *West Bank Settlements*, PEACE NOW (June 2009), <http://peacenow.org.il/eng/node/297>. The concrete plates in those areas have holes on the top, which, according to representatives of the NGO “Peace Now,” were put there to remind the population that it is a temporary measure, which will be quickly removed when needed. Furthermore, more conspicuous means were chosen for populated areas because the fence requires such a wide area surrounding it. However, when the barrier goes through villages, which requires demolishing houses and other extreme measures, the security authorities’ explanation for the concrete wall is that it is for their benefit, and that it is a wall rather than a fence.

¹⁰⁷ Isr. Ministry of Def., *supra* note 105.

¹⁰⁸ E.g., HCJ 2732/05 Head of the City Council of Azoun v. The Government of Isr., ¶ 7, [2006] (Isr.).

¹⁰⁹ Isr. Ministry of Def., *supra* note 105.

¹¹⁰ See, e.g., HCJ 7957/04 Mara’abe v. The Prime Minister of Isr. 60(2) PD 63 [2005]; HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel 58(5) PD 34 [2004].

strip).¹¹¹ There have also been recorded decreases in the scope of terrorist attacks (as opposed to the injuries they cause) in the years since the construction of the Wall.¹¹² Although not all data is accessible, there has been a clear correlation between the construction of the Wall, the decrease in terrorist attacks, and an increase in non-violent resistance.¹¹³

¶44 The proliferation of the non-violent movement includes efforts focused on the different aspects of the Israeli-Palestinian conflict. These efforts include, *inter alia*, litigation, weekly marches against the Wall,¹¹⁴ dialogue and reconciliation efforts,¹¹⁵ local expressions of the Boycott, Divestment and Sanctions (BDS) movement,¹¹⁶ detainees' hunger strikes, the U.N. campaign for statehood, documentary films, and makeshift Palestinian settlements such as Bab Alshams. The development of the non-violent movement is likely the consequence of many factors, but the existence of a tangible, specific issue like the Wall is an issue that Palestinians can oppose and successfully change in the short term.

¶45 The [Palestinian] prisoners are a masculine society or subculture that praises and glorifies the values of aggressiveness and sees nonviolence as feminine . . . the film [5 Broken Cameras]¹¹⁷ has exposed the prisoners to something new. They suddenly discovered that the struggle of these "yuppies," these "spineless" people from Bil'in and Na'alin¹¹⁸ isn't simple at all, but demands faith and sacrifice, and bears with it not a little risk . . . The movie changed the minds of many of the prisoners regarding the nonviolent popular struggle . . . it shook up the prisoners' macho culture and militaristic outlook . . . There is a ton of literature in the jails that explains and glorifies the armed struggle, but there aren't any books about Mahatma Gandhi, for instance, or the struggle of the African-American citizens— Martin Luther King and others . . . this movie can help prevent killing and fresh graves [from being dug] in this land.¹¹⁹

¶46 This passage is an expression of some of the underlying transformations in Palestinian resistance culture today. As the non-violent movement continues to claim

¹¹¹ *Analysis of Attacks in the Last Decade 2000-2010*, ISR. SECURITY AGENCY, <http://www.shabak.gov.il/English/EnTerrorData/decade/Fatalities/Pages/default.aspx>.

¹¹² *Id.*

¹¹³ B'TSELEM, *supra* note 7.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., *About*, COMBATANTS FOR PEACE, http://cfpeace.org/?page_id=2.

¹¹⁶ See, e.g., *Introducing the BDS Movement*, BOYCOTT, DIVESTMENT, AND SANCTIONS, <http://www.bdsmovement.net/bdsintro>.

¹¹⁷ *Five Broken Cameras* (Alegria Productions, Burnat Films Palestine & Guy DVD Films 2011) (a Palestinian-Israeli documentary about the non-violent struggle against the Wall. The film has received a great amount of attention having been nominated for an Academy award and has been screened in several locations in Palestine, including the national Palestinian television channel. This film, as well as others that address the non-violent movement, have also been used by NGOs in schools and other fora in both the OPT and Israel to raise awareness to the possibility and importance of the non-violent movement and the disastrous effects of the occupation).

¹¹⁸ The two villages where weekly marches take place against the Wall. *Id.*

¹¹⁹ Letter from Walid Daqa, Palestinian prisoner, to Dr. Anat Matar, Lecturer, Tel Aviv University, partially reprinted in *Inverse Hasbara: How "5 Broken Cameras" Changed Palestinians' Attitude Toward Nonviolence*, HA'ARETZ (Apr. 4, 2013), <http://www.haaretz.co.il/news/shabahit/premium-1.1986508> (Daqa, 52-year-old, was convicted of membership of a group responsible for the murder of an Israeli soldier and has been sentenced to life. His sentence was recently reduced to 37 years, 27 of which he has already served).

greater victories, more activists will join its ranks, which shows how it is the most effective and equitable manner in which to fight the occupation.

¶47 Israeli security authorities see these non-violent demonstrations as a security threat,¹²⁰ and, in many cases, have used excessive crowd control measures to disperse them, causing increasing numbers of deaths and injuries to civilians.¹²¹ The IDF regularly declares protest venues as closed military zones to try to prevent the protests from taking place. When they do, the military arrests protesters (Palestinians, Israelis, and foreigners) and in some cases uses tear gas, rubber coated bullets, and other violent measures against non-violent protesters.¹²² Nevertheless, the Palestinians are undeterred and continue fighting for their rights in these demonstrations, hoping this will eventually bring a change to their reality. This issue in particular will be further discussed in section V.

¶48 I do not make these observations on the non-violent resistance to paint a skewed picture of reality in the region. Israel remains constantly challenged by real and dangerous security threats to its citizens and troops.¹²³ However, it is the complexity of this situation, the decades of occupation and oppression, and the high toll the conflict takes on both the Israeli and Palestinian societies that all justify continuous attempts to offer legal, political, and social solutions that will improve it. Furthermore, the rise in the non-violent resistance justifies taking a closer look, particularly at the possibility of increased human rights protections.

¶49 International relations scholar Adam Roberts claims there is no need to try to prove that any of Israel's commitments pass an applicability test in a given situation.¹²⁴ He argues that the burden of proof to show that Israel's IHL obligations *do not* apply to the occupied territories is on Israel, and until the burden is met, the assumption is that Israel must conform to the terms of this legal framework.¹²⁵ I tend to disagree with this notion, particularly because the Israeli-Palestinian situation is a unique one in many aspects of international law, and thus requires further inquiry. Moreover, in light of the disputable developments toward the application of human rights law to occupation, and the previously stipulated need to investigate the substantive obligations in context, the ensuing analysis is pertinent. In the following passages I summarize the different approaches to the question of the applicable legal framework to the Palestinian territories, including the Israeli, international, and Palestinian approaches.

IV. THE OPT CONUNDRUM: WHAT IS THE APPLICABLE LEGAL FRAMEWORK?

¶50 Israel is a party to the Geneva Conventions, but as explained below, its official stance is that the Fourth Geneva Convention does not apply *de jure* to the Occupied Territories. On the opposite side of the spectrum, the international legal community has generally rejected this proposition, and continues to maintain that the Fourth Geneva Convention and additional IHL, as well as some human rights norms, fully apply to the

¹²⁰ B'TSELEM, *supra* note 7.

¹²¹ *Id.*

¹²² *Id.*

¹²³ ISR. SECURITY AGENCY, *supra* note 111.

¹²⁴ Roberts, *supra* note 30, at 44.

¹²⁵ *Id.*

West Bank and Gaza.¹²⁶ The following sections introduce some of the primary actors' analyses concerning the OPT situation.

A. *The confines of ambiguity: The official Israeli approach*

¶51 Conceivably, the unique lack of sovereignty in the West Bank on the eve of the Six Day War allowed Israel to maintain a vague approach to the applicable legal framework in the West Bank, leaving sufficient doubt as to whether it was acting in contrast to international law. This approach has developed through a complex interaction between ever-changing government policies, Supreme Court jurisprudence including international and domestic legal contributions, IDF and internal security policies, the military legal system administering the OPT, and internal and external political pressures. Rather than leading to a unified, coherent position, the democratic nature of the Israeli system has led to a fabric of contradicting interpretations of both reality and the law.

1. The Applicability of IHL

¶52 Despite the fact that the Israeli authorities have generally administered the West Bank in accordance with the law of occupation, the Israeli government has never officially recognized the applicability of this body of law on the territories, with one exception. For a brief, four-month period, the Military Commander for the West Bank issued, and then repealed, an order that provided that military courts will observe the provisions of the Fourth Geneva Convention in matters concerning judicial proceedings, and that in case of contradiction between the order and the Convention, the Convention shall prevail.¹²⁷ In 1971, Israel's Attorney General expressed the position that Israel would not acknowledge the *de jure* applicability of the Fourth Geneva Convention, because under Common Article 2 of the Conventions, they apply only to "occupation of the territory of a High Contracting Party."¹²⁸ However, Israel will observe the Convention's "humanitarian provisions."¹²⁹ This approach has prevailed as the official Israeli position, despite the lack of enumeration of the provisions Israel considered "humanitarian," and despite several contradicting court decisions, discussed below.

¶53 The Israeli Supreme Court decided in the late 1970s, shortly after the beginning of the occupation, to apply The Hague Regulations to the OPT.¹³⁰ In the same decision, the court found that Israel's status with regard to the "held" territories is that of an occupying power.¹³¹ This may seem like a trivial statement, but it is important to mention in light of recent developments in which Israeli officials have claimed that there is no occupation.¹³²

¹²⁶ AMNESTY INT'L, ISRAEL AND THE OCCUPIED TERRITORIES: THE PLACE OF THE FENCE/WALL IN INTERNATIONAL LAW, 4 (Feb. 19, 2004), <http://www.amnesty.org/en/library/asset/MDE15/016/2004/en/36f9d952-d634-11dd-ab95-a13b602c0642/mde150162004en.pdf>.

¹²⁷ Rubin, *supra* note 82, at ¶¶ 46-47.

¹²⁸ Fourth Geneva Convention, *supra* note 24, at 17.

¹²⁹ Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 Isr. Y.B. H.R. 262 (1971).

¹³⁰ HCJ 610/78 Oiev and Others v. Minister of Defense 33(2) PD 113 [1979] (Isr.).

¹³¹ *Id.* at 115.

¹³² LEVY, *supra* note 78.

The legal question as the court framed it was whether the petitioners, who the court recognized as protected persons within the meaning of IHL, had standing to demand their rights according to The Hague and Geneva Conventions. The second question was whether the provisions in question had been adopted into domestic law. Despite earlier decisions by the Supreme Court determining that both the Geneva and the Hague Conventions are constitutive and not customary international law, the court now held, relying on an article by Professor Yoram Dinstein,¹³³ that the Hague Conventions are in fact a codification of customary law. The Geneva Conventions, Professor Dinstein argued, cannot be invoked in an Israeli domestic court, because they were not adopted into Israeli law.¹³⁴

¶54 Interestingly, one of the primary claims by the respondents was that all of the Jewish settlements against which the petitioners complained were a part of the IDF's national defense system. Thus, the military commander's position was that the settlements were built due to security concerns, and only in strategically significant areas. The court accepted this position, qualifying the entire settlement establishment as legal and justified.¹³⁵ In a concurring opinion in the case, panel Judge Landau mentioned in particular that article 49(6) of the Fourth Geneva Convention, which prohibits transferring populations into the occupied territory, is a constitutive provision. The judge relied on commentary to the Geneva Conventions edited by Jean Pictet,¹³⁶ which states that article 49(6) "was adopted after some hesitation,"¹³⁷ implying it does not express a well-established custom. In this case, as well as many others, the respondents argued that they implement the humanitarian provisions of the Geneva Convention. The court intentionally did not address this argument, because of the finding that the Geneva Conventions could not be invoked, as they are non-customary.¹³⁸

¶55 Throughout its rich history of case law regarding the occupation, the court avoided making a clear determination on whether the convoluted official approach of the State was an appropriate interpretation of international law. In most cases the court narrowed its decision to the individual case before it, and found a way to apply particular IHL provisions that the parties could agree were "humanitarian;" some of which the court also recognized as customary international law.¹³⁹ In the Ajouri Case,¹⁴⁰ the respondents, the Military Commander for the West Bank, claimed that the orders in question did not violate international law because they were within the scope of article 78 of the Fourth

¹³³ Yoram Dinstein, an international law scholar and Professor Emeritus at Tel Aviv University, is a prominent authority on international humanitarian law. See Yoram Dinstein, *The Verdict in the Matter of Pithat Rafiah (HCJ 302/72 Abu Hilou and Others v. The Government of Israel)*, 3 TEL AVIV U. L. REV. 934 (1974).

¹³⁴ HCJ 610/78 Oiev and Others v. Minister of Defense 33(2) PD 113, 118 [1979] (Isr.).

¹³⁵ *Id.* at 123-4.

¹³⁶ Jean Pictet, Swiss expert on international humanitarian law, served as Vice President of the International Committee of the Red Cross, and primary architect of the 1949 Geneva Conventions.

¹³⁷ 4 JEAN PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 283 (1958).

¹³⁸ HCJ 610/78 Oiev and Others v. Minister of Def. 33(2) PD 113, 126-7 [1979] (Isr.).

¹³⁹ E.g., HCJ. 7015/02 Kifah Mohammad Ahmed Ajouri v. Military Commander for the West Bank 56(6) PD 352, ¶ 13 [2002] (Isr.). It is unclear what the distinction is, according to this doctrine, between humanitarian and non-humanitarian articles of the Fourth Geneva Convention, as the entirety of the Geneva Conventions is a codification of international humanitarian law.

¹⁴⁰ *Id.*

Geneva Convention, relating to assigned residence and internment. Here again the respondents quoted the long-established practice of the Israeli government applying the “humanitarian” parts of the Fourth Convention.¹⁴¹ Relying on this statement, the court assumed that the relevant provisions to the case at hand *were* in fact among the “humanitarian provisions,” so there was no need to further review the validity of the government’s interpretation of international law.¹⁴²

¶56 In the same opinion, the court asserted that the forced displacement of the petitioners was a violation of human rights. However, the court legitimized this violation with the security justification. The court decided that the scope of the permitted violation of human rights is determined by the law of occupation, as codified in The Hague and Geneva Conventions.¹⁴³ The court also found that article 78 is *lex specialis* vis-à-vis article 49, which generally prohibits deportation and forcible transfer, rendering an analysis of the application of article 49 unnecessary.¹⁴⁴ It followed that the military commander had the authority to issue his order in accordance with article 78, and there was no “violation of human rights protected by international humanitarian law.”¹⁴⁵

¶57 In a more recent decision from 2004, the petitioners asked the Supreme Court for remedies for a series of human rights violations by the IDF in Gaza, caused by an active military operation there.¹⁴⁶ Possibly due to the urgency of the decision, as it was given during an active situation of armed conflict, the court determined without extensive analysis that the IDF is obliged to do everything in its power to refrain from harming the civilian population and to ensure fundamental human rights. In the majority opinion, Chief Justice Aharon Barak stated that Israel’s military conduct in Gaza, as far as it concerns the local civilian population, is governed by the Fourth Hague Convention *and the Fourth Geneva Convention*, as well as the general principles of Israeli administrative law.¹⁴⁷ Justice Barak then continued to refer generally to the fundamental principles of IHL in terms of its requirement to ensure protection of the civilian population. In a concurring opinion, Justice Beinisch repeated the same general reference, without any mention of the “humanitarian provisions” or the refusal of the government to apply Geneva IV *de jure*.¹⁴⁸

¶58 Although this decision applied particularly to the situation in Gaza, and involved active conflict, the Gaza Strip was at that time still under occupation similar to the West Bank. It is curious that the court did not repeat the government’s insistence on the “humanitarian provisions” approach here, even though it cited previous decisions in the same vein that emphasized the government’s narrow policy.¹⁴⁹

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at ¶ 17.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at ¶ 18.

¹⁴⁶ HCJ 4764/04 Physicians for Human Rights and Others v. Commander of the IDF in Gaza 58(5) PD 3, ¶ 4 [2004] (Isr.).

¹⁴⁷ *Id.* at ¶ 11.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¶59 Since the eruption of the second Intifada¹⁵⁰ in September 2000 and the construction of the Wall, there has been a natural increase in human rights litigation. In that period, the Supreme Court gave several other decisions that were also inconsistent with the usual position regarding the applicability of IHL.¹⁵¹ In an interview with a former legal advisor to the International Law Branch of the IDF Military Advocate General,¹⁵² the former advisor stated that the inconsistency was also on the part of the state, whose representatives failed in some cases to make that argument. The legal advisor added that Israeli authorities received these decisions with a total lack of concern. He stipulated that since the 1970s and 1980s, when making the argument on the inapplicability of the Fourth Geneva Convention was pertinent for policy makers and State Attorneys alike, those people have been replaced and the flood of human rights cases made them less meticulous about it. “Now,” he added, “no one is fooling himself to think that anyone ‘outside’ will ever buy this argument.”¹⁵³

¶60 Finally, in a case from 2009 concerning the conditions of detainees from the West Bank, the petitioners argued that legal attitudes toward the Fourth Geneva Convention have changed, and it is now considered customary international law.¹⁵⁴ In response, the court returns to its usual doctrine, and stated that regardless of the validity of that argument, the judicial review of Israel’s conduct in the OPT is based on the government’s well-established decision to apply the humanitarian provisions of the Convention as a matter of policy. The court then stated that it should continue its long practice of respecting the Convention’s *customary* provisions in its review.¹⁵⁵ However, in her majority opinion, Chief Justice Beinisch finally added that there was no doubt that where there was an explicit Israeli statute that is inconsistent with international law, *even if it is customary international law*, the Israeli law prevails.¹⁵⁶

2. The applicability of human rights law

¶61 With regard to this legal framework, Israel has also presented a puzzling position. The Almadany case¹⁵⁷ dealt with the IDF preventing food supplies from going into a church complex in the city of Bethlehem where Palestinian citizens and clergy were under siege alongside a group of armed insurgents. In his decision, Chief Justice Barak expressed the Court’s sentiment concerning the application of human rights:

¶62 The State of Israel is a state of Jewish and democratic values. We established a law-abiding state that realizes its national goals and the vision of generations, and is doing so in recognition and actualization of human rights in general and human dignity in particular. Between [a democratic state fighting against terrorists trying to destroy it, and

¹⁵⁰ The second Intifada was the wave of Palestinian violent uprisings against the Israeli occupation. The first Intifada took place during the 1980s.

¹⁵¹ See, e.g., HCJ 3799/02 Adalah—The Legal Center for Arab Minority Rights in Israel v. General of the IDF Central Command 60(3) PD 67 [2005] (Isr.).

¹⁵² Telephone Interview with N.K., Former Legal Advisor of Int’l L. Branch, IDF Military Advocate General, Washington, D.C. (Apr. 18, 2013).

¹⁵³ *Id.*

¹⁵⁴ HCJ 2690/09 Yesh Din v. Commander of the IDF in the West Bank [2010] (Isr.).

¹⁵⁵ *Id.* at ¶ 4-6.

¹⁵⁶ *Id.* at ¶ 6.

¹⁵⁷ HCJ 3451/02 Almadany v. Minister of Defense 56(3) PD 30 [2002] (Isr.).

the recognition of fundamental human rights] there is harmony and compatibility, not a contrast and estrangement.¹⁵⁸

¶163 In the Physicians for Human Rights case,¹⁵⁹ Chief Justice Barak detailed the general principles of administrative law that accompany every Israeli soldier, and asserted that the military must act in the territories, *inter alia* with fairness (substantive and procedural), reasonableness, and proportionality while properly balancing between individual liberties and public needs.¹⁶⁰ When interpreting article 27 of the Fourth Geneva Convention, Barak asserted that in the core of this basic provision lay the recognition of human value and liberty and the sanctity of human life.¹⁶¹ He then compared this notion to section 1 of Basic Law: Human Dignity and Liberty.¹⁶² Barak added that the duty of the military commander is twofold; first, a negative duty to avoid actions that harm the local civilians, and second, the positive duty to take required lawful actions that ensure that the local civilians will not be harmed. These duties must be carried out with reason and proportionality according to the needs in the particular situation.

¶164 The Yassin case from 2002¹⁶³ was a petition by administrative detainees against the conditions of their detention facility. The Court found that because detainees enjoy the presumption of innocence, not only should their conditions be comparable to those of normal prisoners, but also that everything must be done so that their conditions will be better. The security considerations that led to their arrest did not justify inadequate conditions.¹⁶⁴ The Court laid down the normative framework that governs the determination of detention conditions—above all, the principle of human dignity as expressed in Basic Law: Human Dignity and Liberty, and the values of Israel as a Jewish and democratic state. This normative framework tries to delicately balance the need to ensure detention conditions that are as humane as possible, with the need to ensure the security of the state.

¶165 Following its interpretation of the applicable statutes and regulations that applied to the situation, the Court turned to international law. It contended that there is an international array of provisions concerning conditions of custody, the most important of which is in article 10(1) of the ICCPR.¹⁶⁵ This provision expresses customary international law according to the Court, and additionally is in line with the provisions of Basic Law: Human Dignity. It protects the dignity of every person, including a detainee. Furthermore, the decision cited the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.¹⁶⁶ Even though these principles have no

¹⁵⁸ *Id.* at 34-35.

¹⁵⁹ *Physicians for Human Rights*, *supra* note 147.

¹⁶⁰ *Id.* at 393.

¹⁶¹ *Id.* at 394.

¹⁶² Basic Law: Human Dignity and Liberty is the first of two laws of constitutional normative level that provide fundamental protections to human rights in Israel. Article 1 provides: “[t]he purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” Basic Law: Human Dignity and Liberty, 1391 LSI 150 (1992) (Isr.), http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

¹⁶³ HCJ 5591/02 Yassin v. Commander of Ketziot Military Camp 57(1) PD 403 [2002] (Isr.).

¹⁶⁴ *Id.* at 411-12.

¹⁶⁵ *Id.* at 415.

¹⁶⁶ ICCPR, *supra* note 61.

direct applicability in Israel's domestic law, they provide standards for a reasonable governmental authority to abide by.¹⁶⁷

¶166 Despite the lack of a clear statement, one may infer that the affirmation that U.N. Principles *do not* have direct applicability in Israel means that article 10 of the ICCPR does. The decision finally returned to the balance between individual liberty and public safety, explaining the guiding principle in this balance: every person is entitled to his human rights, even when in custody. Detention does not in itself deprive a person of any right, unless it is necessary and stems from the fact of the detention or when it is prescribed by law.¹⁶⁸

¶167 This case is a valuable example of how the Israeli Supreme Court perceives human rights. Although the court acknowledges that some human rights may be customary, and that Israel is a party to the ICCPR, it refrains from expressly implementing the treaty norms directly to the cases at hand. In order to apply, such norms need to be in line with the domestic constitutional protections provided by the basic laws. On the other hand, the Court deems human rights to be part of the natural law principles,¹⁶⁹ and as such are an official source of law to be used by the High Court of Justice.¹⁷⁰ In the Darwish case from 1980,¹⁷¹ former Chief Justice Haim Cohen applied this concept precisely in his minority opinion:

It is the right of a person in Israel, who was sentenced to imprisonment (or lawfully arrested), to be detained in conditions that allow civilized human life. It makes no difference that this right is not explicitly provided in any law: this right is one of the fundamental rights of man, and in a democratic law-abiding state *it is so obvious, that it is of equal value if it were prescribed by law.*¹⁷²

¶168 Notably, despite the assertion that Israel has promoted and maintained a human rights philosophy as a fundamental pillar of its domestic legal system, it also has, since the days of the British Mandate in 1945, been in an official state of emergency. The state of emergency is manifested in several legislative forms, including the Defense Regulations (Emergency)¹⁷³ enacted by the British Mandate to allow it to combat the Jewish and Arab resistance organizations during the British rule. The Regulations and other emergency legislation contain, *inter alia*, vast authorities for the security sector, the establishment and operation of military courts and security related criminal offences, and

¹⁶⁷ *Yassin*, *supra* note 163, at 416.

¹⁶⁸ *Id.* at 417.

¹⁶⁹ § 15(c) of Basic Law: The Judiciary provides: “[t]he Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.” Basic Law: The Judiciary, 1110 LSI 78, § 15(c) (1984) (Isr.).

¹⁷⁰ *See, e.g.*, EA 1/65 Yardor v. Chairman of the Central Elections Committee to the Sixth Knesset 19(3) PD 365 [1965] (Isr.).

¹⁷¹ In the Darwish case, the court decided it was permitted to deprive security detainees from bedframes during their detainment for fear they would use the bedframe parts as weapons. HCJ 221/80 Darwish v. The Prisons Service 35(1) PD 536 [1980] (Isr.).

¹⁷² *Id.* at 538.

¹⁷³ Defence (Emergency) Regulations, 1442 OG (2d Ann.) 855 (1945) (Isr.).

no consideration for human rights.¹⁷⁴ The state of emergency, declared by the Knesset¹⁷⁵ in accordance with Basic Law: The Government,¹⁷⁶ has been renewed annually without fail since the establishment of the state of Israel, and until May of last year.¹⁷⁷

¶69 To the various international bodies, Israel has expressed adamant denial that the human rights Covenants are applicable to the OPT.¹⁷⁸ In its initial report to the Human Rights Committee, submitted in 1998,¹⁷⁹ Israel discussed its dualistic approach to the implementation of treaties in its domestic law. It stated that the provisions of the ICCPR were not adopted into the Israeli law by Knesset legislation, and so the Covenant does not by itself create enforceable individual rights in Israeli courts. However, the basic rights provided in the ICCPR are to a great extent already protected by domestic legislation or case law. For this reason the government did not deem it necessary to enact implementing legislation.¹⁸⁰ Furthermore, the explanatory notes for the draft Basic Laws explicitly mention Israel's ratification of the ICCPR as a motivation to legislate those constitutional norms.¹⁸¹

¶70 In addition to the written report, Israel also testified before the Human Rights Committee, adding further explanations on the applicability of the ICCPR to the OPT. One representative referred to the Interpretation of article 2(1) by the Legal Advisor to the Ministry of Foreign Affairs. It seems that the Legal Advisor accepted the prevalent interpretation that the ICCPR was meant to apply extraterritorially for persons under that state's jurisdiction.¹⁸² The Israeli representative stated that the primary question is whether the Palestinians are in fact under Israel's jurisdiction. He added that to complicate matters, the extent of the rights and responsibilities in the OPT was also affected by the norms of IHL that govern the occupation, and whether such norms are compatible with the obligations in the ICCPR.¹⁸³ Israel thus took the position that there is a clear separation between IHL and human rights law, which were each designed for different situations, and that the IHL framework was much more appropriate for the OPT.¹⁸⁴ It followed that the Covenants do not directly apply to the OPT.¹⁸⁵

¹⁷⁴ *Id.*

¹⁷⁵ The Knesset, the Israeli Parliament, consists of 120 seats filled by direct elections to a wide array of political parties.

¹⁷⁶ Basic Law: The Government, 1780 LSI 158, § 38 (2001) (Isr.).

¹⁷⁷ Declaration of a State of Emergency, in Accordance with Article 38 of Basic Law: The Government, 1781 LSI 158 (2012) (Isr.). The State of Emergency has been renewed despite harsh criticism by a variety of Israeli politicians, academics and civil society organizations. *See, e.g., The Declaration of a State of Emergency*, THE ASS'N OF CIVIL RTS. IN ISR. (May 8, 2012), <http://www.acri.org.il/he/?p=1854>.

¹⁷⁸ U.N. Secretary-General, *Rep. of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13, Annex I: Summary Legal Position of the Government of Israel*, ¶ 4, U.N. Doc. A/ES-10/248 (Nov. 24, 2003), <http://unispal.un.org/UNISPAL.NSF/0/A5A017029C05606B85256DEC00626057>.

¹⁷⁹ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of States Parties due in 1993, Add.: Israel*, U.N. Doc. CCPR/C/79/Add.93 (Apr. 9, 1998).

¹⁸⁰ *Id.* at ¶ 42.

¹⁸¹ *Id.* at ¶ 43.

¹⁸² U.N. Hum. Rts. Comm., 63rd Sess., Sum. Rec. of the 1675th Meeting, ¶ 21, U.N. Doc. CCPR/C/SR.1675 (July 15, 1998).

¹⁸³ *Id.* at ¶ 22.

¹⁸⁴ *Id.* at ¶ 23.

¹⁸⁵ *Id.* at ¶ 27.

¶71 The Israeli representative also mentioned the Interim Agreements,¹⁸⁶ which contained a mutual commitment to human rights and the rule of law in the gradual transfer of responsibilities from Israel to the Palestinian Authority, stating that it would be inappropriate for Israel to account for such issues, as they were under the responsibility of the Palestinians.¹⁸⁷

¶72 In its second periodic report to the Human Rights Committee, Israel held to its position that the ICCPR does not apply to the OPT, which, Israel contended, is not subject to its sovereign territory and jurisdiction.¹⁸⁸ In contrast to the position presented by the Israeli Representative in the previous session, Israel seemingly returned in this case to the interpretation of article 2(1) of the Covenant, by which the requirement for applicability is territory *and* jurisdiction. Israel based this position once again on what it called the “well-established” distinction between IHL and human rights law, and asserted that consequently the Committee had no mandate to address events that occurred in the OPT and were part of the conflict.¹⁸⁹ Once again Israel referred to the transfer of responsibility to the Palestinian authorities in accordance with the Interim Agreement, this time claiming that the “overwhelming majority” of responsibilities in the civil sphere were now under the jurisdiction of the Palestinians. It concluded this issue with the determinate statement that considering this analysis, Israel cannot be held internationally responsible for ensuring the rights of the Covenant in the OPT.¹⁹⁰

¶73 Israel reiterated this position with identical wording in its reports to the U.N. Committee on Economic, Social, and Cultural Rights on the implementation of the ICESCR.¹⁹¹

3. Parliamentary response

¶74 Several elements in Israeli society have realized that the government’s refusal to apply the Fourth Geneva Convention, as well as its international human rights obligations, to the OPT allows it to evade many of its responsibilities toward the Palestinian population. The response to this concern was partially manifested in a draft bill submitted to the Knesset by Member of the Knesset (MK) Mohammad Barakke (joined by 3 more MKs), titled “Implementation of the Geneva Convention on the Territories Held by the Israeli Military Since the June 1967 War (2011).”¹⁹² The bill requires that actions taken by any Israeli authority or by the Israeli military in the territories will not deviate from the provisions of the Convention, and that any such

¹⁸⁶ Interim Agreement, 1995, *supra* note 98.

¹⁸⁷ *Id.* at 132, § 19.

¹⁸⁸ U.N. Hum. Rts. Comm., *Consideration of Rep. Submitted by States Parties under Article 40 of the Covenant, 2d Periodic Rep., Add.: Israel*, ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2, (Nov. 20, 2001), [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2cc0a33c394919e0c1256be9002e1188/\\$FILE/G0146480.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/2cc0a33c394919e0c1256be9002e1188/$FILE/G0146480.pdf).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ U.N. Comm. on Economic, Social and Cultural Rts. (CESCR), *Add. to the Second Periodic Rep. Submitted by States Parties, Israel*, 5, U.N. Doc. E/1990/6/Add.32, (Oct. 16, 2001), <http://www.refworld.org/docid/3f6c53ae4.html>.

¹⁹² Draft Bill Implementation of the Geneva Convention on the Territories Held by the Israeli Military Since the June 1967 War, P/18/3816 (2011) (Isr.), <http://oknesset.org/bill/6428/>.

deviation will constitute a criminal offence.¹⁹³ The same MKs submitted an identical draft in 2003.¹⁹⁴ Neither of these bills progressed in the legislative process.

¶75 In sum, although the official Israeli position suffers from ambiguity, it can be represented in the following broad terms:

- The Hague Regulations represent customary international law and apply to the OPT.
- The Israeli authorities, as a matter of policy, apply those provisions of the Fourth Geneva Convention in that they consider its humanitarian provisions, but do not apply the Convention *de jure*.
- The human rights instruments that Israel is a member of do not directly apply in the domestic law and cannot be directly invoked in its courts. The government denies applicability of any of the human rights instruments to which it is party to the OPT. However, the Supreme Court may apply customary provisions and general concepts of human rights law to particular cases brought to it, if there are no contradicting domestic legal provisions, as well as no convincing security concerns.

¶76 Many human rights are guaranteed by Israel's domestic legislation, and can be relied on in conjunction with international norms before the courts.

V. APPROACHES OF INTERNATIONAL BODIES

A. *The United Nations*

¶77 Since its earliest days, the General Assembly has passed countless resolutions concerning the relationship between Israel and Palestine. It would be futile to review even the best known of those resolutions in the scope of this paper. Suffice it to say that due to the political and non-legal nature of the General Assembly, these resolutions have been directly correlated with the large number of Arab and Muslim states that have been consistently taking an anti-Israeli position.

¶78 Particularly addressing the questions of applicability of international legal frameworks to the OPT, the General Assembly adopted several relevant resolutions in which it affirmed that the Fourth Geneva Convention is applicable to the Occupied Palestinian Territories, including East Jerusalem, and other Arab territories occupied by Israel since 1967,¹⁹⁵ and called on Israel to accept *de jure* applicability of the Convention.¹⁹⁶ The General Assembly included in these resolutions reference to the Conference of the High Contracting Parties to the Fourth Geneva Convention held in 1999, which also adopted declarations in the same vein.¹⁹⁷ Notably, the ICRC has also

¹⁹³ *Id.*

¹⁹⁴ Draft Bill Implementation of the Geneva Convention on the Territories Held by the Israeli Military Since the June 1967 War, P/1175 (2003) (Isr.), <http://www.knesset.gov.il/privatelaw/data/16/1175.rtf>.

¹⁹⁵ G.A. Res. 56/60, U.N. Doc. A/RES/56/60 (Dec. 10, 2001); G.A. Res. 58/97, U.N. Doc. A/RES/58/97 (Dec. 9, 2003).

¹⁹⁶ *See, e.g.*, G.A. Res. 67/119, U.N. Doc. A/RES/67/119 (Jan. 14, 2013).

¹⁹⁷ *Id.*

been consistent in its position that the Fourth Geneva Convention applied de jure to the OPT.¹⁹⁸

¶79 The Security Council, which does possess binding legal authority, has observed this interpretation as well. As early as 1969 it has taken the position that Israel must scrupulously observe the provisions of the Geneva Conventions and international law governing military occupation.¹⁹⁹ It has subsequently reaffirmed this position in numerous other resolutions,²⁰⁰ and has called upon the high contracting parties to the Convention to ensure Israel's respect for its obligations under the Convention in accordance with article 1.²⁰¹

¶80 With regard to the applicability to the OPT of Israel's *human rights* obligations, the General Assembly reaffirmed in its resolutions that the ICCPR, ICESCR and the CRC, all of which Israel has ratified, should be *respected* in the OPT.²⁰² The Security Council has taken a more conservative approach, and has not made explicit statements on the direct applicability of the human rights Covenants.²⁰³

¶81 The Human Rights Committee has expressed concern at Israel's attitude and came to the conclusion that in the current context, the provisions of the ICCPR do apply in the OPT and to Israel's conduct that affects the enjoyment of the Palestinian's rights enumerated in the Covenant.²⁰⁴ The Committee related its position to the long duration of Israel's presence in the territories, Israel's ambiguous attitude towards the future status of the OPT, and the effective jurisdiction the Israeli security forces have in the OPT.²⁰⁵

¶82 As explained in section III(a)(3), Israel contended before the Human Rights Committee that the ICCPR cannot be applied directly to the OPT by way of creating obligations for Israel toward the Palestinian population. In response to this position, which was replicated before the Committee on Economic, Social, and Cultural Rights, the Committee held the same view as the Human Rights Committee: the obligations emanating from the ICESCR apply to all territories under the effective control of a State Party.²⁰⁶

¹⁹⁸ See, e.g., *Annexe I: Conference of High Contracting Parties to the Fourth Geneva Convention Declaration*, INT'L COMM. OF THE RED CROSS (Dec. 5, 2001) [hereinafter *Statement by the ICRC*], <http://www.icrc.org/eng/resources/documents/misc/5fldpj.htm>.

¹⁹⁹ S.C. Res. 271, U.N. Doc. S/RES/271 (Sep. 15, 1969).

²⁰⁰ S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979); S.C. Res. 799, U.N. Doc. S/RES/799 (Dec. 18, 1992); S.C. Res. 904, U.N. Doc. S/RES/904 (Mar 18, 1994).

²⁰¹ S.C. Res. 681, U.N. Doc. S/RES/681 (Dec. 20, 1990).

²⁰² See, e.g., Special Comm. to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, *Rep. of the Special Comm. to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, U.N. Doc. A/66/427 (Nov. 21, 2011), <http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/427>.

²⁰³ See, e.g., S.C. Res. 1544, U.N. Doc. S/RES/1544 (May 19, 2004).

²⁰⁴ U.N. Hum. Rts. Comm., *Concluding Observations: Israel*, 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), <http://www.refworld.org/docid/3fdc6bd57.html%20accessed%2021%20April,%202013>.

²⁰⁵ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee*, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

²⁰⁶ CESCR, *Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 15, 31, U.N. Doc. E/C.12/1/Add.90 (June 26, 2003).

B. The International Court of Justice

¶83 In December 2003, the General Assembly adopted a resolution requesting the ICJ to give an advisory opinion on the question of the legal consequences from the construction of the Wall in the Palestinian territories, considering rules and principles of international law.²⁰⁷

¶84 Israel refused to address the merits of the advisory opinion because of its contention that the court had no jurisdiction on this matter, and even if it does it should refuse for a variety of procedural reasons. The court analyzed each of these arguments and concluded that it does in fact have jurisdiction, and found no compelling reason to use its discretion so as not to issue the Opinion.²⁰⁸ Israel then argued that the Court could not issue the opinion because it did not have the facts needed to make a legal determination. The facts it was missing were, namely, the security threats the Wall was built in a response to, and the effects that it had on the threat and on the Palestinian population. The court found that it does have sufficient evidence to give the advisory opinion, including information on Israel's security concerns.²⁰⁹

¶85 The ICJ began its analysis with a historical account dating back to the Ottoman Empire, and continued to establish that Israel has been *de jure* an occupying power in the West Bank since 1967, based on article 42 of the Hague Regulations.²¹⁰

¶86 With regards to applicable IHL norms, the Court noted that although Israel is not a party to the Hague Conventions and Regulations, it is well established in the text of the Hague Conventions, as well as in the Nuremburg and other tribunals jurisprudence, that this is a declaratory instrument of universally recognized customary international law.²¹¹

¶87 With regard to the Fourth Geneva Convention, the Court noted that article 154 of the Fourth Geneva Convention provides that the Fourth Convention is supplementary to section III of the Hague Regulations, which relates to situations of belligerent occupation.²¹² It then noted that Israel ratified the Geneva Conventions, and did not attach any relevant reservations.²¹³ The Court then mentioned that the Palestinian Liberation Organization, in the name of the Palestinian people, submitted a unilateral declaration to Switzerland as the depositary of the Geneva Conventions that it undertook to apply the four Geneva Conventions and the two additional Protocols.²¹⁴ However, the Swiss depositary determined it was not in a position to decide whether this declaration constituted an accession,²¹⁵ since this was years prior to the General Assembly accepting Palestine as a non-member State.

¶88 The court went on to analyze Common Article (CA) 2 of the Conventions in accordance with the law of treaties, in response to Israel's argument that it does not apply the Fourth Geneva Convention *de jure* due to CA 2's requirement that the occupied

²⁰⁷ G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (8 December, 2003).

²⁰⁸ The Wall Advisory Opinion, *supra* note 36, at 14-54.

²⁰⁹ *Id.* at 55-58.

²¹⁰ *Id.* at 70-78.

²¹¹ *Id.* at 89.

²¹² *Id.*

²¹³ *Id.* at 91.

²¹⁴ *Id.*

²¹⁵ 1949 Conventions and Additional Protocols, and their Commentaries, ICRC, <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

territory is of a High Contracting Party.²¹⁶ The first paragraph of CA 2 requires two conditions for the Conventions to apply: (1) an armed conflict and (2) that the conflict is between two Contracting Parties.²¹⁷ However, the following paragraph, as determined by the Court, was not meant to restrict applicability when the occupied territory is not of a Contracting Party. It was rather intended to clarify that the Convention still applies even when the occupation is met with no armed resistance.²¹⁸ This interpretation is confirmed by the drafters' intent to protect civilians under occupation regardless of how the occupation came into existence, as demonstrated in the Convention's records of negotiations.²¹⁹

¶89 In its ultimate finding that the Fourth Geneva Convention fully applies to the OPT, the court also awarded significance to the fact that the High Contracting Parties to the Geneva Conventions, the ICRC, as well as the U.N. General Assembly and Security Council, have all issued statements and resolutions since 1967 asserting the same position.²²⁰

¶90 Subsequently, the Court continued with an analysis of the applicability of human rights law to the OPT, relying heavily on its previous Advisory Opinion on the issue of nuclear weapons.²²¹ First, in the nuclear weapons Opinion, the Court found that the protection of the rights provided by the ICCPR does not cease in times of war, unless derogated through the specific procedure and requirements in article 4 of the Covenant.²²² Second, the Court provided an analysis of the extra-territorial applicability of the ICCPR, including the different approaches expressed by other international bodies, as reviewed in the previous sections.²²³ It concluded that the ICCPR not only applies in conjunction with IHL, but also provides for extra-territorial applicability in situations of effective control, such as the OPT.²²⁴

¶91 The Court finally addressed the ICESCR and the CRC, and concluded that in these cases too, Israel is bound by its obligations under the Conventions in the areas where it exercises jurisdiction, and is required to lift any obstacle to the enjoyment of these rights in areas where the Palestinian Authorities have jurisdiction and control.²²⁵

C. The Palestinian approach

¶92 In the written statement submitted by the Palestinians to the ICJ for its Advisory Opinion on the Wall, the Palestinians contended first that Israel remains the occupying power of the Palestinian Territories, even after the transfer of certain areas and

²¹⁶ The Wall Advisory Opinion, *supra* note 36, at ¶¶ 94-95.

²¹⁷ Fourth Geneva Convention, *supra* note 24.

²¹⁸ The Wall Advisory Opinion, *supra* note 36, ¶¶ 94-95.

²¹⁹ *Id.*

²²⁰ *Id.* at ¶¶ 97-99.

²²¹ *Id.* at ¶¶ 105-106; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996(I) I.C.J. 226 (Jul. 8, 1996) [hereinafter *Nuclear Weapons Advisory Opinion*].

²²² Nuclear Weapons Advisory Opinion, ¶ 24.

²²³ The Wall Advisory Opinion, *supra* note 36, at ¶¶ 107-110.

²²⁴ *Id.* at ¶ 111.

²²⁵ *Id.* at ¶¶ 112-13.

responsibilities to the Palestinian Authority.²²⁶ They further argue, relying on the ICRC's determination,²²⁷ that as the occupying power Israel must comply with the provisions of the Fourth Geneva Convention with regard to the protection of the Palestinian Population.²²⁸

¶93 Notwithstanding the obligations under the laws of occupation, the Palestinians argue that this application does not nullify international human rights law, which is binding on Israel in its conduct in the OPT.²²⁹ The Palestinians also acknowledge that in certain circumstances such as armed conflict, some human rights can be lawfully violated, but only when certain conditions are met, as laid out in the human rights Covenants.²³⁰ The Palestinians then turn to apply this proposition to particular actions Israel took in the context of the Wall, including in their analysis concepts such as the duties to examine alternatives²³¹ and to cause the least possible harm to human rights,²³² as well as using legitimate versus extraneous considerations in planning the Wall's route.²³³ Finally, the Statement concludes with an enumeration of many of the rights that were expected to be violated by the construction, including the right to work, health, education, family and social life.²³⁴ By erecting the Wall, Israel evades its obligation to protect Palestinian human rights, and thus is in breach of international law.²³⁵

D. Discussion

¶94 The Israeli argument that the Geneva Conventions only apply to occupation of the territory of a High Contracting Party is not convincing. Common Article 2 also provides in its third paragraph that:

¶95 Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.²³⁶

¶96 In its simplest interpretation, this paragraph requires a High Contracting Party to apply its rules even to a non-contracting "power," as long as the latter accepts and applies the provisions of the Convention. Furthermore, it has been suggested that based on the Palestinian's right to self-determination, although they did not at the start of the occupation have a government with official title to the territory, sovereignty lies in the people, not in a government.²³⁷ In this sense, the notion that the Palestinian people were

²²⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: (Request for an Advisory Opinion)*, INT'L CT. OF JUSTICE 27 (Jan. 30, 2004), <http://www.icj-cij.org/docket/files/131/1555.pdf> [hereinafter *Written Statement by Palestine*].

²²⁷ Statement by the ICRC, *supra* note 198, at ¶ 2.

²²⁸ *Id.*

²²⁹ Written Statement by Palestine, *supra* note 229.

²³⁰ *Id.*

²³¹ *Id.* at 28.

²³² *Id.* at 31.

²³³ *Id.* at 31-38.

²³⁴ *Id.* at 39.

²³⁵ *Id.*

²³⁶ Fourth Geneva Convention, *supra* note, 24.

²³⁷ Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L. L. J. 65, 97 (2003).

the *de facto* sovereign of the land prior to the occupation further weakens the Israeli argument that the lands had no sovereign.²³⁸ Finally, it seems that Israel stands alone in its insistence on this evasive approach, when there is an apparent consensus in the international community that at the very least, the Fourth Geneva Convention applies *de jure* to the OPT.

¶97 From the review in section I of the development of the law of occupation, it is clear that throughout the past two hundred years, this body of law has evolved in a very particular trajectory—that is, an increasing emphasis on protection of the individual rights of a civilian population. The most recent development views the human rights framework as a complementary one in cases of lacunae or interpretational challenges. It seems only natural that the next link in the chain will be a full implementation of human rights law, with some limited derogations or restrictions due to the unique circumstances of the occupation. Such restrictions would be subject to the highest scrutiny, and could not be easily justified by general security claims without requiring the state to provide adequate, specific reasoning that meets the standards set out in the human rights Covenants, including necessity, proportionality, legitimate aim, and non-discrimination.²³⁹

¶98 It seems that the main thrust of international legal and scholarly attempts to address the grave human rights situation in the OPT is calling Israel to fully comply with its obligations under the Fourth Geneva Convention.²⁴⁰ One more progressive suggestion by an Israeli scholar, in addition to the Fourth Convention, was to use the human rights instruments as a *guide* for the occupant in the administration of prolonged occupation, just as civilian governments would in administering their own territories.²⁴¹ Another creative suggestion was for the international community to declare time limitations on the possible duration of occupation, and possibly even to transfer the administration of an occupied territory when it exceeds that time limit to an international authority.²⁴² In my view, fully applying the Fourth Convention as well as these creative suggestions are all insufficient responses.

¶99 Without a permanent peace agreement, the occupation will not come to an end. Until that day, I propose implementing human rights law as the *primary* legal framework, and administering the OPT through a substantive human rights lens. This will at the very least alleviate some of the harsh burdens of the occupation, and effectively *catalyze* a lasting solution that will end the occupation.

¶100 As reviewed in section I(a), the law of occupation has been advancing toward incorporation of human rights law *in conjunction* with IHL. In addition to the fact that an increasing number of interpreters of international law accept that the primary human rights instruments apply to Israel's conduct in the OPT, these developments strengthen the argument that some form of international human rights law is applicable to this occupation. However, one of the problems is that none of the bodies that have asserted

²³⁸ Ben-Naftali et al., *supra* note 13, at 568.

²³⁹ See, e.g., *Sidiropoulos v. Greece*, App. No. 26695/95, 1998-IV Eur. Ct. H.R. (Jul. 10, 1998), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58205> (The European Court of Justice analysis of Greece's violation of the freedom of association protected by the ICCPR).

²⁴⁰ See *supra* section III(b).

²⁴¹ ROSALIND COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982* 29 (1985).

²⁴² Ben-Naftali et al, *supra* note 13, at 613.

this view has provided coherent, practical guidance on how they expect Israel to practically apply these two legal frameworks concurrently.

¶101 In a way, the Israeli Supreme Court has attempted to utilize this approach in several cases through the existing Israeli notions of the role of human rights in Israeli law.²⁴³ The Supreme Court has ample experience in harmonizing several sources of law that lack an internal hierarchy when there are no clear answers in statutes. These sources include Jewish law, common law, customary international law, and general concepts of natural law.²⁴⁴ Nevertheless, the Court's application of human rights norms vis-à-vis domestic security and emergency regulations to this day has proved inadequate for the broad protection of the rights of the Palestinians.

¶102 The co-application of IHL and human rights law is understandably unclear, since it is a relatively recent development. But in the context of the Palestinian Territories, I argue more than simply to say that human rights should be the primary legal framework for Israel's conduct. I argue that Israel ought to adopt a multi-faceted approach in which it (1) directly applies its international human rights obligations to the OPT; (2) applies specific IHL notions to provide the conceptual foundation and authority for its administration of the OPT; and (3) subjects its derogations, restrictions and violations of human rights to judicial review, in accordance with the methodology provided by the human rights Covenants. When scrutinizing the conduct of Israeli authorities and security forces, the Israeli Court would be able to use as guidance the abundance of jurisprudence developed by international tribunals in their ICCPR related decisions.

¶103 It would not be beneficial to *exclusively* apply human rights law to the OPT. Several of the fundamental concepts and provisions of IHL may prove useful to accommodate to the context of this situation. Generally, the concepts and provisions that ensure a future viable realization of the Palestinian right to self-determination, without diminishing from the responsibility of Israel to safely and justly administer the OPT, are the ones to be infused into the primary human rights construct. A few prime examples are the fundamental authority of the occupant to administer; the non-transfer of sovereignty and prohibition of annexation; the prohibition on the transfer of population; and the prohibition of unessential legislation, in order to maintain the continuous reminder of the temporal element of the occupation.²⁴⁵ With respect to legislation, the interpretation of "essential" should be extended through a human rights perspective as a guiding principle, to include economic, social and cultural rights.

¶104 In addition to the simple injustice of Israel's deficient protection of the Palestinians with its existing evasive approach, in the following passages I offer several additional arguments as to why adopting human rights law as the primary framework for the OPT is the preferable approach. First, IHL provides an insufficient degree and method of scrutiny of violations; second, Israel's use of security justifications for human rights violations is inherently invalid in the OPT context; third, the proliferation of the non-violent movement further undermines security justifications; fourth, the scope of the requirement of non-discrimination provided by IHL is not as wide or as inclusive as its parallel requirement in human rights law; fifth, the prolonged duration of this occupation

²⁴³ See, e.g., Yassin, *supra* note 163.

²⁴⁴ Law on the Fundamentals of the Law, 5740-1980, 978 LSI 163 (1980) (Isr.).

²⁴⁵ Roberts, *supra* note 30, at 46.

justifies a human rights approach; and, finally, a forward-thinking strategy by Israel would justify adopting this approach.

1. The Degree of Scrutiny

¶105 The drafters of the Fourth Geneva Convention had the Universal Declaration on Human Rights in mind, and included far-reaching individual rights protections.²⁴⁶ However, the drafters designed the Fourth Geneva Convention to protect the civilian population in a short, temporary state of occupation,²⁴⁷ and did not provide adequate means to hold the occupant accountable for violations that may not rise to the level of grave breaches of the Convention.

¶106 The Geneva Conventions specify which of their provisions constitute grave breaches, and require States Parties to enact criminal legislation to punish persons guilty of war crimes.²⁴⁸ The Conventions also establish universal jurisdiction for these war crimes.²⁴⁹ A few examples of acts that constitute grave breaches of Geneva IV when perpetrated against a protected person are willful killing, torture, willfully causing great suffering or serious injury to body or health, unlawful deportation and willful, unlawful, and extensive destruction and appropriation of property not justified by military necessity.²⁵⁰

¶107 Without analyzing whether Israel has committed war crimes, one major issue is the improbability of international prosecutions against Israeli officials for political and jurisdictional reasons.²⁵¹ Even if we set aside Israel's alleged impunity for *grave* breaches,²⁵² IHL does not provide a sufficient system of accountability or enforcement for much of Israel's adverse daily conduct in the OPT. Arguably, the majority of this conduct does not rise to the level of war crimes, but definitely constitutes human rights violations. A human rights approach would be able to effectively, and less dramatically, address these issues.

2. Security Justifications

¶108 The Israeli government currently justifies the military's human rights violations with security needs²⁵³ that, as demonstrated in section V, would not survive the scrutiny provided by the human rights Covenants. The existential security threat to the state of

²⁴⁶ COHEN, *supra* note 241, at 29.

²⁴⁷ *Id.*

²⁴⁸ Fourth Geneva Convention, *supra* note 24, art. 146.

²⁴⁹ *Id.*

²⁵⁰ *Id.* art. 147.

²⁵¹ There have been several attempts by states to invoke universal jurisdiction. *See, e.g., Belgium Opens Way for Sharon Trial*, BBC (Jan. 15, 2003), <http://news.bbc.co.uk/2/hi/europe/2662635.stm> (Belgium's attempt to prosecute former Prime Minister Ariel Sharon for alleged war crimes during the Lebanon war in the 1980s).

²⁵² *See, e.g., U.N. Hum. Rts. Comm., Rep. of the Int'l. Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem*, U.N. Doc. A/HRC/22/63 (Feb. 7, 2013), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/FFM/FFMSettlements.pdf>.

²⁵³ *See id.*

Israel that could justify continuing to oppress the Palestinians has long been gone. The argument is not that there is no threat. Rather, it is for three primary reasons that the existing security concerns do not justify clinging to the minimum standards of IHL protection.

1. The nature of the threat does not rise to the level of hostilities envisioned by IHL in order to justify suspending ordinary human rights protections;²⁵⁴
2. The security concerns balanced against the rights of the Palestinians include protection of the settlements, themselves a breach of IHL;²⁵⁵ and thus,
3. The occupation itself is the *cause*, as well as the target, of the security threat.

¶109 In this situation, the occupation itself has become the embodiment of the armed conflict rather than a side effect. For this reason the occupation cannot be used as justification for applying a lesser form of protection to a population that has the right to self-determination. The normalization of the situation of conflict perpetuates a constant state of emergency that allows for restrictions and derogations from what has become the fundamental basis of international law—the protection of human rights. A progressive approach that only borrows the most essential norms from IHL, and in all other instances ensures the protection of human rights, will advance the goal of ending the occupation, while restricting rights only at the presence of a specific and imminent security threat or other legitimate circumstances, as provided by human rights law.

3. The Non-Violent Resistance

¶110 As discussed in section II, non-violent resistance has become increasingly prevalent in the OPT. Conceptually, this movement is a component of the process of normalization. The longer an occupation lasts, the further it moves from a high-intensity armed conflict to a normalized situation of perpetual oppression. Conceivably, the resistance movements have undergone a parallel process of shying away from armed conflict and turning to other, legitimate methods. This could be attributed to the effectiveness of the Wall and other thwarting efforts by Israeli security, but it could also be seen as a societal change in trend.

¶111 Be that as it may, when juxtaposed with the degree of oppression and rights violations, the non-violent activities significantly undermine Israel's claims of continuous threats to its existence both toward the international community, and within the Israeli and Palestinian societies.

¶112 In contrast, by applying a human rights framework, Israel's ability to derogate human rights in the name of security would be considerably narrower, and would be subject to the requirements of non-discrimination, necessity, proportionality, and would require a nexus between the actions taken and the asserted legitimate aim.

²⁵⁴ See, e.g., *A v. Sec. of State for Home Dept.*, [2004] UKHL 56, ¶ 97 (appeal taken from Eng.) (explaining why terrorist violence does not threaten the life of the nation, hence does not justify derogation from the right to freedom from arbitrary arrest and detention).

²⁵⁵ Ben-Naftali et al., *supra* note 13, at 591.

4. Non-Discrimination

¶113 Currently, the Israeli legal system applies fully to the settlers in the West Bank. The Palestinians, on the other hand, are confined by the limitations of the military regime and its inconsistent application of certain IHL norms. This is an inherently discriminatory situation, for which IHL does not provide a proper solution.

¶114 The principle of non-discrimination appears not only in the human rights instruments, but also in the Fourth Geneva Convention as a fundamental basis of application of the other substantive rights.²⁵⁶ However, the meaning of non-discrimination in the Geneva context is non-discrimination in the application of the Convention itself, among protected persons.²⁵⁷ Furthermore, in his commentary, Jean Pictet explicitly mentions that although the enumerated categories of discrimination are not exhaustive, discrimination on the basis of nationality was intentionally not included.²⁵⁸ In other words, applying a minimal standard of protection in accordance with IHL to a population of one nationality, and a higher standard of protection in accordance with national law and international human rights to people of another nationality, does not constitute a violation of IHL.

¶115 In contrast, human rights law provides a much stricter requirement of equality before the law and prohibition of discrimination on any grounds, including national origin.²⁵⁹ It also specifically requires non-discrimination in the application of the rights of the Covenants, without derogation under any circumstances on the rights to life, freedom from torture, cruel, inhumane, or degrading treatment and freedom of thought, conscience and religion.²⁶⁰ If applied, this framework, as opposed to even the highest standard of IHL, can provide for an entirely different reality for the Palestinians if their rights are equalized to those enjoyed by the settlers, in accordance with the principle of non-discrimination.

5. Prolonged Occupation

¶116 Both concepts of military necessity and humanitarian concerns may, and ought to have, different manifestations in situations of active combat vis-à-vis occupation.²⁶¹ The situation of prolonged occupation further reflects the conclusion of intense combat within that territory,²⁶² and the transition to a situation of maintenance until a resolution to the underlying conflict is reached.

¶117 Why then is there a fundamental problem with applying only the law of occupation framework? The reason most scholarly opinions, as reviewed in this paper, conclude at least some form of human rights application rather than adamantly adhering to IHL, is that traditional laws of occupation are in a sense a means to perpetuate the occupation, thus achieving its opposite goal. They do so through the set of rules designed to keep

²⁵⁶ Fourth Geneva Convention, *supra* note 24, art. 27.

²⁵⁷ PICTET, *supra* note 137, at 206.

²⁵⁸ *Id.*

²⁵⁹ ICCPR, *supra* note 61, art. 26.

²⁶⁰ *Id.* art. 4.

²⁶¹ MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION AND INTERNATIONAL COERCION 739-740 (1961).

²⁶² *Id.*

things as they are, based on the anachronistic nineteenth century notions of short-term occupation in the midst of a full-fledged war.

¶118 The understanding that the administration of an occupied territory should develop over time and acclimate to a situation of prolonged occupation is not new. Scholars as early as 1916 have asserted that the occupant must administer the territories as if they were in conditions of peace, and that in prolonged occupation, new legislation is essential.²⁶³ Although fully applying the Fourth Geneva Convention to the OPT would be a positive first step, it is clearly insufficient²⁶⁴ after 45 years of oppressive military rule.

¶119 This argument supports the conclusion that a human rights framework would be more appropriate for the conditions of a prolonged occupation such as the OPT, because it would provide a fundamental basis for the life of the Palestinian population which is, or should be, more similar to a state at a time of peace than to a state in a situation of war.

6. Strategic Policy

¶120 Israeli policy makers ought to adopt a forward-looking strategy. They ought to understand the possible implications of continuing to oppress the Palestinian population until the day the occupation ends, considering terrorism and violent resistance are mostly focused on ending that oppression. By applying human rights law and consequently improving their lives, Israel can ensure the Palestinians will be better prepared for a substantive democracy based on the rule of law when they assume full independence.

¶121 In a sense, this strategic approach could lower the security threat to Israel when it will no longer be able to control the society it has been oppressing. Furthermore, it will allow the Palestinians to develop a viable economy, and focus their efforts on building the physical and conceptual infrastructure for their future independence, instead of focusing on resistance. Consequently, this could reduce threats to Israel's security in the short term as well.

¶122 Notably, the human rights approach not only provides a stronger protection to the fundamental rights of the Palestinians, but it also assigns positive obligations and responsibilities to Israel to assist the Palestinians in preparing for independence. This includes, for example, helping in the design and training of effective law enforcement; preparing viable justice, taxation and social security systems; and establishing adequate health care facilities that are easily accessible and geographically widespread.

7. Challenges

¶123 Finally, it is important to note some major challenges for the adoption of the human rights approach. First is the ineffectiveness of U.N. General Assembly and Security Council resolutions in changing Israeli conduct. Even if these bodies adopt hundreds of resolutions calling on Israel to comply with its human rights obligations in the OPT, they do not have the power to change Israeli policy. Second, this approach is not codified in any international instrument. As long as it exists only in academic papers, or even judicial opinions, Israel is not likely to see itself as bound by it, and would rather maintain its

²⁶³ A. Leurquin, *The German Occupation of Belgium and Article 43 of the Hague Regulation of the 18th October, 1907*, 1 INT'L. L. NOTES 55 (1916); MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 225 (1959).

²⁶⁴ COHEN, *supra* note 241, at 29.

convoluted approach and protect its political interests. Conceivably, the major human rights instruments could in the future add provisions explicitly stating that they apply in times of armed conflict, and that particularly in situations of prolonged occupation, they have primacy over IHL. However, this kind of codification is unlikely to take place quickly if at all, considering the difficulty of reaching agreement in such important multilateral treaties.

¶124 Third, even if international and regional tribunals adopt this approach in their jurisprudence, their decisions are not binding to Israel. Such decisions could only be used as supporting sources for the interpretation of human rights law in Israeli courts. In addition to the improbability that this proposal would ever be adopted in full by the Israeli government, it suffers from an enforcement challenge. Israel is not a member of any regional organization, and cannot be held accountable by any of the existing human rights judicial bodies such as the European Court of Human Rights.

¶125 This challenge is no different from a scenario in which Israel applies the Fourth Geneva Convention *de jure*, since it is also not a member of the International Criminal Court for individual prosecutions, and generally does not accept the jurisdiction of the ICJ for state level adjudication.²⁶⁵ With the exception of the universal jurisdiction option, the only tribunal that could practically hold Israeli authorities, officials and military personnel accountable for violations in accordance with human rights law standards is the Israeli Supreme Court. However, in order to change the Court's application of law on Israel's conduct in the OPT, a major policy shift would need to occur in the Israeli government. In the conclusion of this paper I further discuss how such a change could be advanced within the confines of the current system and political climate.

V. BAB ALSHAMS

¶126 Evidently, the proposed approach has the potential of significantly changing the socio-political landscape in the OPT. Following is a brief analysis of how this approach, if applied by the Israeli Supreme Court, could have produced a different result in the case of the Bab Alshams activists.

¶127 The right to freedom of peaceful assembly is guaranteed in article 21 of the ICCPR,²⁶⁶ and also echoed in article 8 of the ICESCR.²⁶⁷ It is not one of the absolute rights, and can be subjected to certain restrictions if they meet all of the following conditions:²⁶⁸

1. The restrictions are prescribed by law,
2. They are necessary in a democratic society, and
3. They are in the interests of a legitimate aim, *i.e.* national security, public safety, public order, public health or morals or the protection of the rights and freedoms of others.²⁶⁹

²⁶⁵ See *supra* section III(b).

²⁶⁶ ICCPR, *supra* note 61, art. 21.

²⁶⁷ ICESCR, *supra* note 68, art. 8.

²⁶⁸ U.N. Hum. Rts. Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, ¶ 15, U.N. Doc. A/HRC/20/27 (May 21, 2012) (by Maina Kiai) [hereinafter *Report of the Special Rapporteur*].

²⁶⁹ *Id.*; ICCPR, *supra* note 61, art. 4.

¶128 Furthermore, in adopting laws that restrict this right, the right must be the rule and the restriction the exception.²⁷⁰ Consequently, the state is obliged to only place restrictions that are *proportionate* to the pursuance of the legitimate aim.²⁷¹ According to article 4 of the ICCPR, in a state of emergency, certain rights can be derogated if the state can show that the situation constitutes a threat to the life of the nation, and that any derogation is strictly required by the exigencies of the situation.²⁷² The Human Rights Committee determined further that although freedom of assembly was not included in article 4 as one of the rights that *cannot* be derogated in a state of emergency, the possibility of restricting freedom of assembly under the terms of article 21 is sufficient.²⁷³ Thus, any derogation from the right to freedom of assembly could not be justified by the exigencies of a state of emergency.²⁷⁴

¶129 In the past few years, since the increase of demonstrations against the Wall, the IDF has taken a variety of actions to quell the demonstrations. These include arresting organizers and participants, use of crowd-control measures to disperse protesters, and issuing orders declaring the protest venues closed military zones.²⁷⁵

¶130 In 1967, the military commander of the West Bank issued an order prohibiting “incitement and hostile propaganda actions” by Palestinians,²⁷⁶ which includes vast discretion for military commanders and imposes restrictions on the freedom of assembly, expression and other rights.²⁷⁷ The Order is used to this day to charge, investigate, and arrest activists.²⁷⁸

¶131 Despite statements by military personnel that restrictions are only placed on violent demonstrations, in reality the Order allows for the military commanders to prevent some protests from taking place before they even begin—for example, by refusing to grant permits or arresting protesters the night before a demonstration is planned.²⁷⁹

¶132 As explained in the introduction to this paper, in the case of Bab Alshams the IDF was able to evict the activists through a security necessity exception provided by the Court in its injunction prohibiting eviction.²⁸⁰ This happened without regard to the fact that prior to the arrival of the security forces, the village was conducting peaceful activities and rioting only began after the forces started arresting the activists.²⁸¹

¶133 Does the eviction of Bab Alshams activists meet the conditions required by the ICCPR? First, the military commander in the West Bank has the legal authority to declare an area a closed military zone and take measures to restrict protests in accordance with

²⁷⁰ Report of the Special Rapporteur, *supra* note 268, at ¶ 17.

²⁷¹ UNHRC GC 31, *supra* note 44, at ¶ 6.

²⁷² U.N. Hum. Rts. Comm., *General Comment No. 29: Article 4: Derogations During a State of Emergency*, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ B’TSELEM, *supra* note 7.

²⁷⁶ Order No. 101, Order Regarding Prohibition of Incitement and Hostile Propaganda Actions (Aug. 27, 1967) (Isr.), http://www.btselem.org/download/19670827_order_regarding_prohibition_of_incitement_and_hostile_propaganda.pdf.

²⁷⁷ *Id.*

²⁷⁸ B’TSELEM, *supra* note 7.

²⁷⁹ *Id.*

²⁸⁰ *Abu Ghanam*, *supra* note 1.

²⁸¹ *Id.*

the laws of occupation and Order 101. This means that the IDF's actions were prescribed by law.

¶134 Second, in accordance with the Human Rights Committee General Comment 29 and the report of the special rapporteur, restricting the right to freedom of assembly cannot undermine the democratic concepts of pluralism, tolerance, and broadmindedness.²⁸² This means that despite meeting the legitimate aim requirement, the IDF would not be able to use security necessity as a *blanket justification* to quell every anti-occupation assembly. Rather, it would need to prove to the Court in each case that the threat to security or public order outweighs the obligation to protect the freedoms of assembly and expression.

¶135 In this case, the IDF claimed that there is an actual probability that allowing the activists to remain in the area would lead to severe disturbances to the public order. In reality, although the respondents were right that the site became an attraction to dozens of other activists, the site is in fact located on a hill in an open, unpopulated area,²⁸³ and any violent action by protesters was done in the context of resisting arrest. Hence, in applying the correct balance through the human rights approach, the IDF's claims of threats to the public order would not have been accepted.

¶136 It can also easily be argued that declaring the area a closed military zone, evicting all the protesters, and arresting many as a response to the erection of twenty tents on a secluded hill is an astoundingly disproportionate response.

¶137 In light of this analysis, the Court would have had to render the eviction unlawful, instruct the IDF to allow the reestablishment of the village, and possibly even order the military to compensate the organizers, particularly those who were arrested.

VI. CONCLUSION

¶138 This paper offers a contextual approach to the Israeli-Palestinian situation, relying on the contemporary notion that human rights law generally applies to occupation. I have attempted to persuade the reader that due to the increasing prevalence of non-violent resistance, and the uniquely long duration of the occupation, an approach where the primary legal system is human rights law, and IHL is secondary, is the appropriate application of international law to the Palestinian Territories. The backward reality of this conflict is that the occupation itself has turned into the embodiment of the armed conflict, rather than being simply a side effect. This was somehow normalized into a long-standing situation of oppression of human rights in the OPT. Applying human rights law first, with the addition of IHL concepts detailed in the discussion above, seems to be the most adequate response to the injustice.

¶139 Considering Israel's decades of refusal to apply the Fourth Geneva Convention to the OPT, it is extremely unlikely that the proposed, highly progressive approach will be adopted by Israel. In a sense, there is an advantage to develop such theories in an academic setting, free from the confines of pragmatism and politics. For example, in an imagined ideal future where the independent, democratic state of Palestine lives peacefully beside the de-militarized state of Israel, those two states could have a special tribunal for human rights, which would serve as an appeals chamber for the Supreme

²⁸² Report of the Special Rapporteur, *supra* note 268, at ¶ 17.

²⁸³ *Abu Ghanam*, *supra* note 1.

Courts of both states in matters concerning the application of their international human rights obligations. This of course is an unrealistic vision for the future, and might take a hundred years until we reach that point in the region. On the other hand, there are several realistic scenarios in which the proposed approach could be partially applied, and still significantly improve the state of human rights in the Palestinian Territories.

¶140 One possibility is through litigation within the Israeli system. Although under the leadership of the new Chief Justice Asher Grunis the court is currently more conservative, there have been many groundbreaking cases that modified the conduct of the authorities in the OPT, including the torture decision,²⁸⁴ decisions changing the course of parts of the Wall,²⁸⁵ and the decision against the use of human shields.²⁸⁶

¶141 Attempting to change the applicable legal system through Supreme Court litigation is quite a challenge, and definitely cannot be done in a broad, general sense. But it can change certain practices in the conduct of Israeli authorities, if increasing numbers of human rights violations cases will be brought before the court in which the arguments are persuasively based on this conceptual foundation. Furthermore, such arguments would need to be supported by a variety of international and comparative jurisprudence and legal literature. This would mean that as a first step, this proposal would have to be further developed by academics, international bodies, and judicial opinions elsewhere.

¶142 Another possibility is through the inevitable accomplishment of a permanent peace agreement. In this scenario, similarly to the way the Oslo Accords were designed, the end of the occupation will not happen instantly, but will rather be a gradual process of transferring responsibilities. In the framework of such an agreement, it is quite plausible to require that until full responsibilities are transferred to the Palestinian government, Israel will use human rights law as the primary basis for administering the territories it has control over, while complementarily incorporating the previously discussed necessary IHL concepts. This would mean that during the transition period, the Israeli authorities (both military and civil) will have to administer the territories without discrimination, and with a much higher degree of human rights protections for the Palestinian people, while continuously preparing the ground for a fully independent and democratic Palestinian government. In this period the Israeli authorities would also be subject to a human rights level of scrutiny.

¶143 In applying this approach to the transition period (as well as prior to that time, depending on successful litigation and policy changes), the Palestinian people are likely to become more aware, reliant and demanding of human rights, once their own government will take full control. The benefit of introducing the Palestinians to a higher level of protection of their fundamental rights is that they will consequently not allow their own government to deviate from a democratic, rule of law model. In turn, the Palestinian government will be forced to maintain the level of protection of the citizens of Palestine. In this optimistic scenario, Palestine could become the most progressive and human rights-oriented state in the Arab world, leading the way for further reforms in other countries.

²⁸⁴ HCJ 5100/94, Public Committee Against Torture in Isr. et al. v. Gov't of Isr., 53(4) PD 817 [1999] (Isr.).

²⁸⁵ See *Beit Sourik*, *supra* note 110.

²⁸⁶ HCJ 3799/02 Adalah—The Legal Center for Arab Minority Rights in Isr. et al. v. GOC Central Command, IDF et al. 60(3) PD 67 [2005] (Isr.).

¶144 Finally, in further developing these ideas, there are many more questions that ought to be examined. These include, for example, the effects of the U.N. General Assembly recognizing Palestine as a non-member state²⁸⁷ on the possibility of Palestine acceding to the Geneva Conventions, thus possibly changing Israel's ability to claim the territories have no sovereign. A more inclusive and in-depth analysis of how the human rights approach would affect the different aspects of the occupation, and whether this approach could be applicable to other situations in the world would also be beneficial in strengthening its legitimacy as a development in international law. Another inquiry to be considered is developing a detailed set of guidelines for applying IHL and human rights law harmoniously, including precise provisions, interpretations, and a hierarchy between the two frameworks in particular situations.²⁸⁸

¶145 In any case, there is no doubt that academic papers are just one avenue of many by which those invested in the Middle East attempt to find creative solutions to end the conflict. All of these roads should be taken.

²⁸⁷ G.A. Res. 67/19, *supra* note 9.

²⁸⁸ Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437, 455-56 (2009).